TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 586.

LEVI C. WEIR, PRESIDENT OF THE ADAMS EXPRESS COMPANY, APPELLANT,

vs.

L. C. NORMAN, AUDITOR OF PUBLIC ACCOUNTS FOR THE COMMONWEALTH OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 14, 1896.

(16,365.)

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1 Circuit Court of the United States for the District of Kentucky, at Frankfort, Kentucky.

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal Court hall, in the city of Frankfort, on Monday, June 8th, A. D. 1896.

Court met.
Present: Hon. John W. Barr, judge.

Be it remembered that heretofore, to wit, on the 3rd day of January, A. D. 1896, the complainant, by its counsel, Ramsey, Maxwell & Ramsey and Stone & Sudduth, filed in the clerk's office of this court, at Louisville, Kentucky, a bill in equity; which was and is in words and figures as follows, viz:

United States Circuit Court, District of Kentucky.

LEVI C. WEIR, President of the Adams Express Company,
vs.
L. C. NORMAN, Auditor of Public Accounts of the Commonwealth of Kentucky.

To the judges of the circuit court of the United States for the district of Kentucky:

Levi C. Weir, a citizen and resident of the State of Ohio, brings this bill against L. C. Norman, a citizen and resident of the State of Kentucky; and thereupon your orator complains and says—

2 That your orator is the president and a shareholder of the Adams Express Company, which is a copartnership or joint stock association organized many years ago in the State of New York, where its principal place of business is and always has been, and where its meetings are held and its books and general assets are kept and owned. Said company is composed of about three thousand members or copartners, owning together 120,000 equal shares or interests represented by certificates to which no pecuniary value has ever been assigned, but which for some years have had a market value of not less than $100.00 per share. All of said members or shareholders have a joint ownership and interest in the cause of action hereinafter stated, but they are too numerous to be joined as parties hereto; and your orator therefore, as such president and member or shareholder, brings this suit, not only on his own behalf, but on behalf of the company and all of its members, none of whom is a citizen or resident of the State of Kentucky. Said company is not a corporation, but a copartnership, differing in no essential respect from an ordinary copartnership, except that it is provided in the articles of association that the interests or shares of the members may be transferred, and that neither such transfer nor the death of a member shall work a dissolution of the company.

The defendant is and at the times hereinafter mentioned was the auditor of public accounts of the Commonwealth of Kentucky.

On November 11, 1892, the General Assembly of the Com-
3 monwealth of Kentucky enacted a law now known and hereinafter referred to as chapter 108, being sections 4019 *et seq.* of the Kentucky Statutes 1894. Said act provides (articles I and II) for the taxation of your orator's company, in common with persons and companies generally, upon all of its property, real and personal, of every kind and nature, including moneys and credits, held or owned by it within the Commonwealth of Kentucky for State, county, municipal, and other purposes, according to the fair cash value of the property. All of such taxes have been duly assessed and paid by your orator's company, and it makes no complaint thereof; but articles III and IV of said act provide (sec. 4077) that every express company, and also certain other companies named in said section, "shall, in addition to the other taxes imposed on it by law, pay annually a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, or taxing district where its franchises may be exercised." The place or places where such local taxes are to be paid and how apportioned are determined by the auditor, treasurer, and secretary of State, who are constituted by the act a board of valuation and assessment for that purpose. In the case of express company, such as your orator's company, whose lines extend beyond the limits of the State, said State board is directed (section 4081) to fix the value of the entire capital stock of the company, and it is thereupon declared in said section that "that portion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State bears to the lines owned, leased, or controlled in this State and elsewhere shall be the value of the
4 corporate franchise of such corporation liable for taxation in this State, and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through or into which such lines pass or *is* operated in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of the lines in the State less the value of any tangible property assessed or liable to assessment in any such county, city, town, or taxing district." Section 4082 declares that "whenever any person or association of persons not being a corporation nor having capital stock shall in this State engage in the business of any of the corporations mentioned in the first section of this article (among others, that of an express company), then the capital and property or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article in like manner as if such person or association of persons were a corporation;" so that under said act your orator's company is taxed for State, county, municipal, and other purposes not only upon all of its property within the State, to which it does not object, but is also

declared to be taxable upon that proportion of the value of all of its capital and property wherever situated as represented by the market value of its certificates or shares which its lines or routes in Kentucky bears to all of its lines throughout the Union upon the claim or pretense that the company enjoys or exercises some franchise in the State of Kentucky which is subject to taxation by that State.

In order to enable said State board to determine the value of said pretended franchise, your orator's company was required to and did make and deliver to the defendant between September 15 and October 1st, 1895, a verified statement in the form prescribed by the auditor, showing, so far as it could, the facts required by sections 4078 and 4079 concerning its business, shares, property, income, and lines, including the number and amount of its shares, the highest price at which they had been sold at a *bona fide* sale within twelve months next before September 15th, the amount and kind of its tangible property in the State; where situated, assessed, or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair, voluntary sale, viz, $36,614.53; the length of the entire lines operated, owned, leased, or controlled in the State, viz., 1,913 miles, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere, viz., 25,000 miles.

Your orator's company accompanied said statement and report with an express notification to the defendant that the report was made and delivered under protest, upon the ground that the statute requiring the same was invalid because in contravention of the Constitution of the United States.

Said State board thereupon fixed the valuation of the alleged franchise of your orator's company in accordance with the provisions of said act at the sum of $1,463,040.00, and has notified the company that said sum would be assessed against it as a franchise tax. The amount of taxes payable to the State upon said assessment is 42½ cents on every $100 thereof, and the total tax, including the various local taxes assessable thereon, will amount to about $20,000.00.

Said company is and for a great many years last past has been engaged in the express business in the United States, which consists in carrying for hire express packages, as distinguished from ordinary freight, on passenger and express trains, steamboats and stages in the care and custody of employés of the company who always accompany the packages. The company has no ownership of or interest in any of the said means of conveyance in the State of Kentucky, but merely pays the railroad companies and the owners of steamboats and stages in said State for the carriage of its messengers and their accompanying packages. The company has no property in the State of Kentucky except certain horses, wagons, harness, trucks, safes, office fixtures, and other appliances, located at different points in the State, the items of principal value being horses, wagons, and trucks, which are used by the company in the collection and delivery of packages in the various towns and cities.

All of said property, including the moneys and credits of the company within the State, have been duly returned and assessed for taxation for State, county, municipal, and other purposes in the various localities where the same is located at the fair cash value thereof, which does not exceed the sum of $36,614.53, and the taxes thereon have been duly paid. The company has and on the fifteenth of September had no other property in the State of Kentucky or subject to the taxing jurisdiction of that State.

7 In many towns in which it does business and in which it would be taxable under said act upon said pretended franchise, it has no property, its express packages being collected and delivered by hand or by means of horses and wagons hired for that purpose. The principal business done by said company in the State of Kentucky is interstate commerce, to wit, the carriage of express matter between points in that State and points in other States and across the State between points in other States, although a portion, comparatively small, of its business in Kentucky does consist in carrying express matter from one point to another in that State. The company holds no franchise from the State of Kentucky or from any other State or government, nor being a corporation under the laws of the State of Kentucky or of any other State or government, but a copartnership without any corporate franchise and having or exercising no other privilege or franchise not allowed by law to natural persons. Your orator therefore insists that said statute of the Commonwealth of Kentucky is in contravention of the interstate-commerce clause of the Constitution of the United States, because it attempts to enforce against your orator's company the payment of a tax for the privilege of carrying on its business in said State, which is principally interstate commerce, and is a tax upon the regulation of interstate commerce.

Said tax is not and does not purport to be a tax against your orator's company in respect of the property held or owned by it in the State of Kentucky and subject to the taxing jurisdiction of

8 that State, but is and is declared to be a franchise tax in addition to the taxes assessed against it upon all of its property within the State. If, however, the act can be construed as one for the taxation of the company's property in the State of Kentucky your orator insists that it is nevertheless in contravention of the constitution of the State of Kentucky, and particularly of section 172 and of sec. 174, which provides that "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempt by the statute, and that all corporate property shall pay the same rate of taxation as is paid by individual property," and is also in contravention of the interstate-commerce clause and of the fourteenth amendment of the Constitution of the United States, for the reason that it attempts to tax property which is not within the taxing jurisdiction of the State, and to value and assess property within the State for purposes of taxation unequally and otherwise than upon the basis of its value as property. The value of the company's shares and of

the shares of express companies generally is determined not so much by the amount or value of the property or appliances which they use in carrying on their business as by the skill, diligence, fidelity, and success with which they conduct their business. Your orator's company employs thousands of men who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the consequent value of its shares are largely the result of their effort, fidelity, and integrity, and of the skillful management and supervision of its business. Said company, furthermore, owns in other States real and personal property of great value aside from the appliances of its express business, including stocks and other securities, which is not held or owned or taxable in the State of Kentucky, and some of which, such as Government bonds, is not taxable at all, all of which, however, together with the business connections of the company and the reputation and good will that it has earned in the course of fifty years of public service, enter largely into the value of its capital shares. Said attempt, therefore, to tax the company in Kentucky upon the proportion of its entire capital or property or shares which its lines or routes in Kentucky bears to the whole length of its lines includes the taxation of elements of value not existing in the State of Kentucky and not taxable by it. Nor can the value of the company's property in the State of Kentucky be ascertained, even approximately, by applying or considering the proportion which its routes in Kentucky bears to the total length of all its routes, because its earnings are not uniform and in Kentucky are less per mile than its earnings in communities that are more thickly settled and of greater business activity, and are much less than its average earnings per mile. Moreover, the market price of the company's shares is speculative and variable, depending upon financial and other conditions not at all connected with the company, its business, or its property, and does not therefore afford any proper, reasonable, or just criterion for estimating the value of the company's property.

Said act, sec. 4091, provides as follows:

"All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company, or association by the auditor, and every such corporation, company, or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any such corporation, company, or association failing to pay its taxes, penalty, and interest after becoming delinquent shall be guilty of a misdemeanor and, on conviction, shall be fined fifty dollars for — day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction."

The defendant claims that said company is delinquent, and that by virtue of the provisions of said act it is liable to the onerous

penalties declared by the act, and is threatening to proceed to enforce and collect said tax and penalties, and unless restrained by the order of this court the defendant will apportion and certify to the county clerks of more than sixty-eight counties of the State the proportionate amount of said assessment in accordance with said act, and the county clerks will certify to each county, city, town, or taxing district in which said company does business the portion thereof taxable in each of said cities, towns, or taxing districts in each of said counties for collection, and said company will suffer irreparable injury and will be subjected to a multiplicity of vexatious suits and prosecutions and to an illegal lien upon its property within the State.

To the end, therefore, that your orator and said company may not be subjected to the multiplicity of suits which would
11 otherwise be necessary, and that said company may be spared irreparable injury, and that its property in the State may not be subjected to an illegal cloud and lien, your orator prays for a writ of subpœna against L. C. Norman to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted, commanding him to refrain from certifying said valuation or assessment or any part thereof to any county clerk of said State and to refrain from collecting or attempting to collect any of said taxes alleged to be due to the State of Kentucky under said assessment until the final order and determination of this court, and that upon such final hearing a decree may be made perpetually enjoining said defendant from making said certification and from collecting any of said taxes or penalties, and for all other proper relief to which your orator may be entitled.

RAMSEY, MAXWELL & RAMSEY,
STONE & SUDDUTH,
Counsel for Plaintiff.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

The affiant, H. G. Ransburg, states that he is the chief officer of the Adams Express Company in the aforesaid State and county and he believes the statements of the foregoing bill are true.

H. G. RANSBURG.

Subscribed and sworn to before me by said H. G. Ransburg this January 3, 1896. My commission expires March 16, 1896.

JNO. F. GROENE,
[SEAL.] *Notary Public, Jefferson Co., Ky.*

12 On the same day, to wit, on the 3rd day of January, A. D. 1896, the following orders were made and entered herein, viz:

LEVI C. WEIR, President of the Adams Express Company,
Complainant,
vs.
L. C. NORMAN, Auditor, Defendant.

Came the complainant, by counsel, and also defendant, L. C. Norman, auditor of the Commonwealth of Kentucky, who entered his appearance in this cause by his counsel, the attorney general of the Commonwealth of Kentucky, and on motion of complainant it is now ordered that the defendant, L. C. Norman, auditor of the Commonwealth of Kentucky, his agents and servants or his successor or successors in office, be, and are hereby, enjoined and restrained from certifying the valuation and assessment in the bill mentioned or any part thereof to any county clerk of the State of Kentucky, and he is also enjoined and restrained from collecting or attempting to collect any taxes mentioned in the bill of complaint or the penalties thereon or from enforcing in any manner the said assessment pending the further order of this court.

It is further ordered that a bond be given in the sum of five thousand dollars, and this order shall not take effect until the execution of said bond with approved security; and it is further ordered that this case be transferred to the United States circuit court sitting at Frankfort, Kentucky.

And the said complainant executed bond, conditioned as aforesaid, with Silas F. Miller and H. M. Burford as sureties; which
13 bond is approved. Said bond, executed, approved, and filed on January 3rd, 1896, was and is in words and figures as follows, viz:

United States Circuit Court, District of Kentucky.

LEVI C. WEIR, President The Adams Express Co.,
vs.
L. C. NORMAN, Auditor.

Know all men by these presents that —— —— are held and firmly bound unto L. C. Norman, auditor of the Commonwealth of Kentucky, in the sum of five thousand dollars; to the payment of which they bind themselves, each for himself and his heirs, executors, and administrators, firmly by these presents.

Sealed with their seals and dated this 3rd day of January, 1896.

The condition of the above obligation is such that whereas Levi C. Weir, of the State of Ohio, having filed on the chancery side of the circuit court of the United States for the district of Kentucky a bill against said L. C. Norman, auditor of the Commonwealth of Kentucky, and having obtained an allowance of an injunction as prayed for in said bill from said court, now, if the said Levi C. Weir shall abide the decision of said court and pay all moneys and costs which shall be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

SILAS F. MILLER, *Surety.*
H. M. BURFORD.

Approved:
JNO. W. BARR, *Judge.*

14 On a day following, to wit, on the 8th day of January, A. D. 1896, the following order was made and entered herein, viz:

LEVI C. WEIR, Pres't,
vs. } 246.
L. C. NORMAN, Auditor.

This day came the defendant, by his counsel, and filed his demurrer to the complainant's bill of complaint herein, and the court, not being advised thereof, takes time.

Said demurrer was and is in words and figures as follows, viz:

In the Circuit Court of the United States for the District of Kentucky.

LEVI C. WEIR, President, &c., Complainant,
vs. } Demurrer.
L. C. NORMAN, Auditor, Defendant.

This defendant, L. C. Norman, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer shows that the said plaintiff has not in and by said bill made or stated such a cause as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

15 W. S. TAYLOR,
Att'y Gen'l of Ky.
WM. J. HENDRICK,
Counsel for Def't.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

WM. J. HENDRICK,
Of Counsel for Def't.

On a day following, to wit, on the 8th day of June, A. D. 1896, the following order was made and entered herein, viz:

LEVI C. WEIR, President of the Adams Express Co., Complainant,
vs. } 246.
L. C. NORMAN, Auditor, Defendant.

The court, having considered the demurrer of the defendant to the complainant's bill, having heard the argument of counsel, and being fully advised, files a written opinion and adjudges that the

demurrer be, and the same is hereby, sustained; to which the complainant excepts.

The complainant, by his solicitors, tendered and moved the court to file an amended bill herein; to which the defendant, by his counsel, excepted, and the said motion having been argued by counsel and the court, not being sufficiently advised thereof, takes time.

Said written opinion was and is in words and figures as follows, viz:

16 ADAMS EXPRESS COMPANY } Three Cases, == 246, 247, & 248.
v.
L. C. NORMAN. }

These cases are similar to the case of The Western Union Telegraph Co. *v.* Norman, opinion just filed, except the complainants insist that they are not incorporated, and that they are not corporations, but copartners, and that they do business under certain powers which were granted to them by the State of New York.

If we are correct in our construction of the Kentucky revenue law, the fact that this company is not incorporated and is not a corporation, I think, makes no difference in the result or in the interpretation of the law.

The demurrer in these three cases must therefore be sustained, and it is so ordered, and also in case No. 203.

JNO. W. BARR.

Said opinion, referred to in above opinion, is in words and figures as follows, viz:

17 THE WESTERN UNION TELEGRAPH CO. } No. 250.
vs.
L. C. NORMAN, Auditor, etc. }

On demurrer to the bill.

The bill demurred to is as follows:

Bill in Equity.

"(Title of Court and Cause.)

"To the judges of the circuit court of the United States for the district of Kentucky:

"The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York and a citizen of said State, brings this its bill against L. C. Norman, a citizen and resident of the State of Kentucky and auditor of public accounts of said Commonwealth; and thereupon your orator complains and says—

"That your orator is and for many years last past has been engaged in the business of transmitting intelligence by means of electricity between points in America and Europe and between towns and cities and villages in the United States, including the State of

Kentucky, and owns and uses in said business telegraph lines extending all over the United States, including the State of Kentucky, and lines of cable across the Atlantic ocean, and employs thousands of persons constantly in the conduct of said business.

"On June 5th, 1867, your orator duly accepted the provisions of the act of Congress passed July 24th, 1866, entitled 'An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other pur-
18 poses,' and all of its telegraph lines in the State of Kentucky which it owns, operates, or controls are constructed upon post-roads of the United States.

"On November 11, 1892, the General Assembly of the Commonwealth of Kentucky enacted a law now known and hereafter referred to as chapter 108, being sections 4019 *et seq.* of the Kentucky Statutes 1894. Said act provides (articles I and II) for the taxation of your orator, in common with persons and companies generally, upon all of its property, real and personal, of every kind and nature, including its telegraph lines and moneys and credits held or owned by it within the Commonwealth of Kentucky for State, county, municipal, and other purposes, according to the fair cash value of said property. All of said taxes have been duly assessed and paid by your orator, and it makes no complaint thereof; but articles III and IV of said act provide (section 4077) that every telegraph company, and also certain other companies named in said section, 'shall, in addition to the taxes imposed on it by law, pay annually a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, or taxing district where its franchises may be exercised.' The place or places where such local taxes are to be paid and how apportioned are determined by the auditor, treasurer, and secretary of state, who are constituted by the act a board of valuation and assessment for that purpose. In the case of a telegraph company, such as your orator, whose lines extend beyond the limits of the State, said State board is directed (section 4081) to fix the value of your orator's capital stock, and it is thereupon declared in said section that 'that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State
19 bears to the lines owned, leased, or controlled in this State and elsewhere shall be the value of the corporate franchise of such corporation liable for taxation in this State, and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through or into which such lines pass or *is* operated in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of the lines in the State, less the value of any tangible property assessed or liable to assessment in any such county, city, town, or taxing district.' So that under said act your orator is taxed for State, county, municipal, and other purposes, not only upon all of its property within the State, to which it does not object, but is also declared to be taxable upon that proportion of the value of its capital stock which the length of its lines in Kentucky

bears to the length of its lines throughout the world, upon the claim or pretence that the company enjoys or exercises some franchise in the State of Kentucky which is subject to taxation by that State.

"In order to enable said board to determine the value of said pretended franchise, your orator was required to and did make and deliver to the defendant between September 15th and October 1st, 1893, a verified statement in the form prescribed by the auditor, showing, so far as it could, the facts required by sections 4078 and 4079 concerning its business, shares, property, income, and lines, including the number and amount of its shares, the highest price at which they had sold at a *bona fide* sale within twelve months preceding September 15th, the amount and kind of its tangible property in the State; where situated, assessed, or liable to assessment in the State, and the fair cash value thereof, to wit, $192,976.91;
20 the length of the entire lines operated, owned, leased, or controlled in the State, to wit, 8,647 miles, and in each county, incorporated city, town, or taxing district, and the entire line operated, control-ed, leased, or owned elsewhere, to wit, 189,576 miles.

"Your orator accompanied said statement and report with an express notification to the defendant that the report was made and delivered under protest, upon the ground that the statute requiring the same was invalid because in contravention of the Constitution of the United States. Said board thereupon fixed the valuation of your orator's alleged franchise, in accordance with the provisions of said act, at the sum of $1,042,020, and has notified the company that such sum would be assessed against it as a franchise tax. The amount of taxes payable to the State upon said assessment is 42½ cents on every $100.00 thereof, and the total tax, including the various local taxes assessable thereon, will amount to about $10,000.00.

"All of your orator's property, including its telegraph lines, moneys, and credits within the State of Kentucky, have been duly returned and assessed for taxation for State, county, municipal, and other purposes by the taxing officers of the various localities through which said telegraph lines pass or in which said property is situated at the fair cash value thereof, which does not exceed the sum of $192,976.91, and the taxes thereon have been duly paid. Your orator has and on the 15th day of September had no other property in the State of Kentucky subject to the taxing jurisdiction of that State. The principal business done by your orator in the State of Kentucky is interstate commerce, to wit, the
21 transmission of telegraphic messages between points in that State and points in other States and across said State between points in other States, although a portion, comparatively small, of its business in Kentucky does consist of transmitting messages from one point to another in that State.

"Your orator holds no franchise from the State of Kentucky, being incorporated alone under the laws of the State of New York. Your orator therefore insists that said statute of the Commonwealth of Kentucky is in contravention of the interstate-commerce clause

of the Constitution of the United States, because it attempts to enforce against your orator the payment of a tax for the privilege of carrying on its business in said State, which is principally interstate commerce, and also as an agency of the United States in the transmission of messages for the Government, and that said statute is therefore a tax upon and a regulation of interstate commerce and of said business done for the Government of the United States.

"Said tax is not and does not purport to be a tax against your orator in respect of its property in the State of Kentucky and subject to the taxing jurisdiction of that State, but is and is declared to be a franchise tax in addition to the tax assessed against it upon all of its property within the State. If, however, the act can be construed as one for the taxation of your orator's property in the State of Kentucky, your orator insists that the act is nevertheless in contravention of the constitution of the State of Kentucky, and particularly of section 172 and of section 174, which provides that 'all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempt by the
22 constitution, and that all corporate property shall pay the same rate of taxation as is paid by individual property,' and also is in contravention of the interstate-commerce clause and of the fourteenth amendment of the Constitution of the United States for the reason that it attempts to tax property which is not within the taxing jurisdiction of the State and to value and assess property within the State, for purposes of taxation, unequally and otherwise than upon the basis of its value as property.

"Your orator owns personal property in the State of Kentucky, including its telegraph lines, office furniture, appurtenances, and money and credits, of the value of $192,976.91. It did own the same on September 19, 1893, and it then owned no other property in said State, and all of its property has been duly returned and assessed for taxation and the taxes thereon have been paid. The entire length of the lines of telegraph leased or controlled by your orator in Kentucky on September 15 was 8,647 miles. The entire length of its lines in other States and countries, including the Atlantic cables, was 189,576 miles. Your orator submits that a fair valuation of its property in the State of Kentucky, which consists entirely of said telegraph lines and appurtenances, cannot be ascertained, even approximately, by applying the proportion which such mileage in Kentucky (— miles) bears to its entire mileage throughout the world upon the valuation of all the shares of the company, whether such valuation be a stock-exchange value or the actual value of such shares, because such valuation includes elements of value not existing in the State of Kentucky and not taxable by it and because your orator's telegraph lines are not of uniform value
23 per mile. Thousands of miles of its telegraph lines lie in cables under the high seas, which cost from $3,000 to $4,000 per mile. In the more densely settled portions of the country, like Massachusetts, New York, Pennsylvania, and New Jersey, where also your orator's trunk lines are very large, the cost per mile of poles is much greater than in the State of Kentucky, where the lines

are light and built through a sparsely populated region. A considerable mileage of your orator's lines lies in underground conduits, where the cost per mile greatly exceeds that in Kentucky. In the far West of the United States the necessity of transporting poles and wires from the East adds largely to the cost per mile of line, and many thousands of miles of line have been built in advance of the railroads and at a great cost of transportation by wagons across the plains and mountains.

"The Federal and foreign franchises, contracts, and patent rights held and enjoyed by your orator, none of which exist in the State of Kentucky or enter into the value of the property there situated, are of very great value, and your orator has large investments in bonds and stocks of other corporations, principally telephone companies and local telegraph companies, none of which are situated in Kentucky or taxable in said State, all of said bonds and stocks being held in your orator's treasury, in the State of New York. Said bonds and stocks are of the value in the aggregate of $7,633,230.12.

"Your orator also has large investments in real estate in New York city and Chicago and other States and towns in the United States and Canada of the value of more than $5,013,326.64, none of which is situated in the State of Kentucky or taxable by
24 that State. Any apportionment to Kentucky of the capital stock of the company on the mileage basis will therefore necessarily include the value of such shares, bonds, real estate, Federal and foreign franchises, contracts, and patent rights, all of which are without the taxing jurisdiction of the State of Kentucky.

"Your orator's income is derived not merely from the use of personal and real estate in the conduct of its business, but it employs in said business the personal services of thousands of persons skilled in the business of telegraphy, and your orator's net income, and therefore the market and actual value of its shares, depend in a great measure upon the fidelity and skill with which their duties are performed, and a tax based upon such market value or upon the income of your orator must therefore rest largely upon the services rendered and income derived outside of the State of Kentucky and not subject to the taxing jurisdiction of said State. Moreover, the market or exchange price of your orator's shares is speculative and variable, depending upon financial and other conditions not at all connected with your orator, its business or its property, and does not, therefore, afford any proper, reasonable, or just criterion for estimating the value of your orator's property.

"Your orator's gross earnings throughout its entire system for the year ending September 15th, 1893, were $24,095,625.83 and its income for the same period was $6,464,583.83. Its gross receipts in Kentucky, including its receipts from interstate business, as well as local business, were $351,183.90. Its gross receipts during the same period upon business done wholly within the State of Kentucky were $72,410.75.

25 "Your orator is not able to state the total expense of said business so done in Kentucky, but it is estimated by your

orator at from $250,000.00 to $300,000.00, so that the proposed tax upon said alleged franchises would require your orator to pay in the State of Kentucky more than 90 per cent. of its net income in the State from all of its business, including interstate commerce, a rate of taxation which will be substantially destructive of your orator's business.

"The amount of business done per mile in many parts of the country greatly exceeds the amount per mile done in Kentucky, and the profit gained by your orator upon its business per mile in Kentucky is much less than its profits upon its business per mile in many other States and countries and is considerably less than its average profit per mile.

"Said act, section 4091, provides as follows:

"'All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company, or association by the auditor, and every such corporation, company, or association failing to pay its taxes after receiving thirty days' notice shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any such corporation, company, or association failing to pay its taxes, penalty, and interest after becoming delinquent shall be guilty of a misdemeanor and on conviction shall be fined fifty dollars for each day the same remains unpaid, to
26 be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction.'

"The defendant claims that your orator is delinquent, and that by virtue of the provisions of said act it is liable to the onerous penalties declared by the act and is threatening to proceed to enforce and collect said tax and said penalties, and unless restrained by the order of this court the defendant will apportion and certify to the county clerks of more than sixty-eight counties of the State the proportionate amount of said assessment, in accordance with said act, and the county clerks will certify to each county, city, town, or taxing district in which your orator does business the portion thereof taxable in each of said cities, towns, or taxing districts in each of said counties for collection, and your orator will suffer irreparable injury and will be subjected to a multiplicity of vexatious suits and prosecutions and to an illegal lien upon its property within the State.

"To the end, therefore, that your orator may not be subjected to the multiplicity of suits which would otherwise be necessary, and that it may be spared irreparable injury, and that its property in the State may not be subjected to an illegal cloud and lien, your orator prays for a writ of subpœna against L. C. Norman to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived), and that an injunction *pendente lite* be granted commanding him to refrain from certifying said valuation or assessment or any part thereof to any county clerk of said State and to refrain from collecting or attempt-

ing to collect any of said taxes alleged to be due to the State
27 of Kentucky under said assessment until the final order and
determination of this court, and that upon such final hearing a decree may be made perpetually enjoining said defendant from making said certification and from collecting any of said taxes or penalties and for all other proper relief to which your orator may be entitled."

The Kentucky law applicable to the questions raised in this:

CHAPTER 108, SEC. 4019. "An annual tax of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed."

SEC. 4020. "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of the corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

SEC. 4077. "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company,
dining car company, sleeping car company, chair car com-
28 pany, and every other like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment, for fixing the value of said franchise * * * the place or places where such local taxes are to be paid by * * * * corporations on their franchise, and how apportioned where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed upon them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require."

SEC. 4078. "In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of

this article, shall annually between the fifteenth day of September and the first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require."

SEC. 4079. "Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county the statement shall in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or control-ed in this State, and in each county, incorporated city, town or taxing district, and the entire line operated control-ed, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: Provided that said board from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus

found shall be the value of the corporate franchise subject to taxation as aforesaid."

SEC. 4080. "If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was
31 made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State."

SEC. 4081. "If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or control-ed in this State bears to the total length of the lines owned, leased or controlled in this State and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of the lines in the State, less the value of any tangible property assessed, or liable to assessment in such county, city, town or taxing district."

Sec. 171 of the constitution provides "that taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

32 SEC. 174. "All property whether owned by natural persons or corporations shall be taxed in proportion to its value unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based upon incomes, licenses or franchises."

SEC. 181. "The General Assembly may, by general laws only, provide*d* for the payment of license fees on franchises, stock used for breeding purposes, the various trades occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to im-

pose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

Opinion.

The demurrer to the bill raises—

1st. The question of the jurisdiction of this court.

2nd. Whether or not the tax, as alleged in the bill, is upon interstate commerce and within the inhibition of the Federal Constitution.

3rd. Is the tax as provided by the Kentucky legislature a violation of the constitution of Kentucky?

The jurisdiction of the court is claimed because of the diverse citizenship of the parties and because the tax is alleged to be in violation of the Federal Constitution. The diverse citizenship is aptly alleged, and the amount of the tax in controversy which is sought to be enjoined, so far as it may have been for the
33 benefit of the State, is more than $2,000, exclusive of interest and costs, and that appears upon the face of the bill.

The bill, in addition, in seeking to enjoin the collection of the taxes levied for the benefit of the State of Kentucky, seeks to enjoin the auditor, Norman, from certifying to the different county clerks, 68 in number, their respective proportions of the taxes assessed by the board of valuation and assessment, and alleges that these local taxes, with the tax for the benefit of the State of Kentucky, will amount to about $10,000. The aggregate of these local taxes is thus shown to be over $2,000, exclusive of interest and costs. The case, we think, is not within the principle of Fishback *v.* W. U. Tel. Co., decided by the Supreme Court March 2nd, 1896, and the previous case of Walter *v.* The R. R. Co., 147 U. S., 370. In both of these cases it was sought to enjoin the collection of local taxes which had been assessed and levied by the respective counties and municipalities, hence the local taxes had been distinctly separated, so that a separate action could have been maintained against the counties and municipalities if the taxes had been paid under protest. Here it is sought to prevent the auditor from completing the appraisement and levy of taxes, which, if completed without legal authority, would be a wrongful act and one probably subjecting him to an action by the party injured thereby.

However this may be, the amount of tax in controversy between the plaintiff and defendant for the benefit of the State of Kentucky is over $2,000, exclusive of interest and costs. The jurisdiction of the circuit court seems, therefore, to be clear from the face of the bill.

34 The bill alleges, as ground for the equitable jurisdiction and the granting of an injunction, the complainant's liability to a multiplicity of suits if the assessment and levy is completed and an irreparable injury, which will be caused by the enforcement of the penalties of the law for the non-payment of these illegal taxes. It is the uniform practice in this State to allow an injunction to restrain either the assessment or collection of illegal taxes, and the

equity jurisdiction in such cases has been frequently sustained by the court of appeals.

See L. & N. R. R. *v.* Warren Co., 5 Bush, 245.
Gates *v.* Barrett, 79 Ky., 295.
Louisville Water Co. *v.* Clark, 94 Ky., 47.

But independently of this uniform practice in this State, which sustains the exercise of equitable jurisdiction of injunction in such cases, the allegations of this bill as to multiplicity of suits and the irreparable injury which the assessment and collection of these taxes would cause the complainant *is*, we think, sufficient to sustain the jurisdiction upon general principles.

W. U. Tel. Co. *v.* Poe, 61 Fed. Rep., 469.
Sanford *v.* Poe, 69 Fed. Rep., 546.

These cases are distinctly in point, as there the equitable jurisdiction was sustained because of the multiplicity of suits which would follow from the completion of an assessment and the levy of local taxes, which local taxes *taxes* seperated would have been less than the $2,000 limit.

The complainant is not seeking relief because the valuation and assessment of the board are excessive, but that the entire valuation and assessment is illegal and void. It may be assumed as
35 settled that the State of Kentucky has authority to levy and collect a tax on all of the property of the complainant, tangible as well as intangible, if within the taxing power of the State. This right, however, is subject to certain constitutional limitations. Hence the State cannot tax foreign or interstate commerce as such, nor can it tax its agencies or instrumentalities in such a manner as to interfere with the regulations of this commerce, which belongs exclusively to Congress. The State may tax property within the State, though it be employed in whole or in part in foreign or domestic commerce, as that use does not of itself exempt it from liability to taxation, as is all other property within the jurisdiction of the State.

Delaware R. R. Tax cases, 18 Wall., 232.
W. U. Tel. Co. *v.* Mass., 125 U. S., 530.
Leloup *v.* Mobile, 127 U. S., 640.
Pullman Palace Car Co. *v.* Penna., 141 U. S., 18.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S., 688.

The present inquiry is, therefore, as to the kind of tax which is sought to be imposed and the location of the property sought to be taxed.

There is much difficulty in construing the various provisions of the Kentucky statutes heretofore quoted. It will be seen that the language of sec. 4077 is that certain corporations and companies "shall, in addition to the other taxes imposed by law annually, pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, or taxing district where its franchise may be exercised."

A franchise in its legal sense is defined by Chief Justice Taney

in Bank of Augusta *v.* Earle, 13 Pet., 595, thus: "Franchises are special privileges conferred by Government upon individuals, and do not belong to the citizens of the country generally of common right. It is essential to the character of a franchise that it
36 should be a grant from the sovereign authority, and in this country no franchise can be held which is now derived from a law of the State."

If this were the only meaning of the word franchise in this section many other provisions of the law would be meaningless. Thus, other provisions of this law distinctly apply not only to corporations, but to companies and associations who have no corporate existence and who have no franchise; they apply to domestic companies and associations as well as to foreign companies and associations; and so the capital stock, the value of which is to be ascertained by this board of valuation and assessment, applies by the express provisions of the other sections to associations and companies as well as to corporations. As we construe the law, the legislature intended that the corporations, companies, and associations named in the various sections should be treated as an entirety and taxed as such, and in using the word- "capital stock" it intended to include all of the property of these corporations, companies, and associations and to have all of the property valued as an entirety.

The information which is required of the corporations, companies, and associations, both foreign and domestic, by sections 4078 and 4079 is for the purpose of enabling the board of valuation and assessment to value and assess the capital stock of the corporations, companies, and associations. The capital stock to be thus valued by the board includes the entire property, tangible and intangible, whereever situated, and from this value is to be taken all of its tangible property, whereever situated, assessed for taxation in this State or elsewhere. "The value of this tangible property is to
37 be taken from the valuation of the entire capital stock and what remains is the value of the property which is to be taxed under the provisions of this act" (sec. 4079). Thus the tax mentioned in sec. 4077 is not an additional tax upon the same property, but a tax upon the intangible property of the corporation, company, or association that has not been taxed as tangible property; and it is provided in another section that if the corporation, either foreign or domestic, "be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company the lines of which extend beyond the limits of this State, that the proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased, or controlled in this State and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State."

The same rule is applied to local taxation authorized by counties, cities, etc., and in addition all tangible property locally taxed is to be deducted (sec. 4081). Thus in the taxation of these corporations, companies, and associations intangible property is taxed upon the basis of the mileage of the lines inside and outside the

State. This taxation assumes that there is used in the common business of the companies, corporations, and associations inside the State an average proportion of its intangible property.

Notwithstanding the use of the words "franchise" and "corporate franchise" in the several sections of this statute, we are of the opinion that the property to be taxed under its provisions as intangible property is not confined to franchises or corporate
38 franchises, but it is intended to include all intangible property by the mode indicated, whether or not such property be legally "franchises or corporate franchises." It is not a tax upon an occupation or franchise granted by other States or by the United States, but a tax upon the property owned and enjoyed by these several associations, companies, and corporations which is claimed to be within the taxing power of the State. The power of taxation by a State over telegraph companies is clearly stated by Chief Justice Fuller in a recent case. He says:

"It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce or on the receipts derived therefrom or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained; but the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce may be taxed or a tax may be imposed on the corporation on account of its property within a State and may take the form of a tax for the privilege of exercising its franchises within the State if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction therefore not being susceptible of exceeding the sum which might be levied directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose
39 protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

And again he says: "Doubtless no State could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland, Cincinnati, &c., R'y *v.* Backus, 154 U. S., 439–445."

Postal Tel. Cable Co. *v.* Adams, 155 U. S., 695–'7.
See also Pullman P. P. C. Co. *v.* Penna., 141 U. S., 18.

In that case (Postal Telegraph *v.* Adams) the court sustained a

tax upon the telegraph Co., which was distinctly a tax for the privilege of doing business in the State, upon the ground that it was no more than the property itself ordinarily would be burdened by an ad valorem tax, and in discussing the character of the tax as being a privilege tax the court say: "In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of State legislation" (p. 700).

The case of The W. U. Tel. Co. *v.* Massachusetts, 125 U. S., 530, is, we think, distinctly in point, not only in regard to disregarding the nomenclature of the State statute, but also as to the constitu-
40 tionality of a tax like the one now being considered. In that case the State of Massachusetts enacted a tax law which is substantially in terms those of the Kentucky statute as to ascertaining the cash value of the capital stock of the corporations and associations either organized under its laws or foreign corporations doing business in the State, except that in the assessment and tax complained of there no deduction was made for real estate situated outside the State of Massachusetts, and which was valued at over three millions of dollars and presumably taxed elsewhere when the facts showed that there was no real estate of the company within the territorial limits of that State. That law required that a tax should be paid upon its "corporate franchise" at a valuation equal to the aggregate value of the shares of its capital stock, as determined in the mode prescribed therein, and this was made applicable to corporations or associations chartered or organized elsewhere than in the State.

Justice Miller in the course of the opinion (p. 547) said:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a State, and counsel for appellant occasionally speaks of a tax authorized by the law of Massachusetts upon this as well as other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises; but by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the
41 just amount which any corporation engaged in business within its limits shall pay as a contribution for the support of the government upon the amount and value of the capital so engaged by it therein."

This case has been frequently cited and has been approved in the cases of Massachusetts *v.* W. U. Tel. Co., 141 U. S., 41, and Postal Tel. Cable Co. *v.* Adams, 155 U. S., 699.

In the case of Massachusetts *v.* W. U. Tel. Co., 141 U. S., 41, Justice Gray again states, in considering this Massachusetts tax, that "by whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation, and these laws attempt to ascertain the just amount

which any corporation engaged in business within its limits shall pay as a contribution for the support of its government upon the amount and value of the capital so employed by it therein."

This mode of ascertaining and assessing the value of the property has been sustained by the Supreme Court in case of Cleveland, etc., R'y *v.* Backus, 154 U. S., 439, and also the circuit court of appeals in Sanford *v.* Doe have held a law of Ohio, not unlike this one, as not within the inhibitions of the Federal Constitution. See 69 Fed. Rep., 547.

This bill states with some detail the complainant's different kinds of property in this State on the 15th of September, 1893, and its value as claimed by it and the valuation and assessment of its property on that day as made by the board of valuation and assessment, and insists that there is property included therein which is not legally taxable in this State, but it nowhere alleges that the valuation and assessment by this board is not in compliance
42 with the provisions of the Kentucky statute, nor does it seek to have the board's valuation and assessment corrected either as to the kind of property included in the assessment or the valuation placed upon it; on the contrary, it is alleged that the complainant refused to recognize this board or its valuations or assessments as valid or legal in any respect whatever. As the statute does not indicate or describe the property which is to make up the capital stock required to be valued and assessed, we can only consider now whether the statutory mode prescribed is a violation of the Federal Constitution.

The allegation that the complainant has given in and that the State has assessed all of its property, including telegraph lines, moneys, and credits within the State of Kentucky, and that this tax has been fully paid when taken with the other allegations of the bill does not show that all the intangible property which is provided for in the Kentucky statute has been legally assessed and the tax paid thereon. If in fact this board has, in making up the value, estimated patent rights—that is the monopoly granted by the United States—or any other property which should not have been valued in making up this assessment, the bill is not drawn with a view to raise such question.

Under the Kentucky statute the intangible property of this corporation cannot be assessed except by this board of valuation and assessment, and hence we cannot assume from any allegation of the bill that the property which was assessed by this board has ever been legally returned for taxation or the taxes paid thereon. We conclude that the mode prescribed by this statute for valuation and assessment is not within the commerce clause of the Federal
43 Constitution, nor do we see that it violates the provision of the XIV amendment of the Federal Constitution.

Bell's Gap R. R. Co. *v.* Penna., 134 U. S., 233.

The next inquiry is whether or not these provisions of the Kentucky statute are in violation of the Kentucky constitution.

Considering the tax which is assessed under the valuation and

appraisement of the board as a property tax, the only inquiry under the Kentucky constitution is whether or not it is a uniform tax with other property taxed in the State.

Section 4020 requires: "All real and personal property within the State, and all personal estate of persons residing in the State, and of all corporations organized under the laws of the State, whether the property be in or out of the State, including intangible property, shall be considered and estimated in fixing the value of the corporate franchises as hereinafter provided, and shall be subject to taxation, unless exempted by the constitution, and shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale."

Sec. 4077 in describing the persons who are liable for this tax for intangible property includes all corporations. There is, therefore, perfect uniformity as to all corporations and the rate of tax levied thereon.

The provisions of sec. 174 of the constitution which require "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the constitution, and all corporate property shall pay the same rate of taxation paid by individual property," do not preclude intangible property which is owned by a corporation from being taxed.

44 If individuals own intangible property which is taxable, it should be taxed like corporate property owned by corporations under the constitution; indeed, individuals are so taxed in this statute when they are associated together in companies; but if there is a kind of intangible property owned by corporations which from its very nature cannot be owned by individuals, then there is no reason why the State should not tax that intangible property. It is not an objection to taxing property of a corporation, domestic or foreign, that no individual tax-payer has similar property.

There is no allegation in this bill and nothing in this record which presents the question of making a discrimination between individuals owning intangible property or the corporations or associations mentioned in section 4077 owning such property.

The court regrets extremely that these provisions of the constitution and of the revenue law have not been construed by the Kentucky court of appeals. There are three cases in which the matter of taxation under the present constitution has been discussed by the court of appeals. Although the question now being considered has never been decided, I understand, both from the case of Levi *v.* City of Louisville, 16 Ky. Law Rep., 872, and Henderson Bridge Company *v.* The Commonwealth, 17 Ky. Law Rep., 389, that the court construed the provisions of these statutes which require the valuation and assessment of the capital stock to include all of the tangible and intangible property of the corporation, company, or association as herein indicated. Those cases, with the case of The Southern Building Association *v.* Norman, auditor, 17 Ky. Law Rep.,

45 887, lay more stress upon the term "franchise" than I have done in this opinion. I, however, construe the opinions in those cases to mean that intangible property in the revenue law not

only includes the value of franchises, but also any other property rights which the companies or the associations may own and which are taxable.

We are of the opinion that the present bill does not present the question of what particular property may or may not be taxable in the State of Kentucky and which might be included by the board of valuation and assessment in making up the total of its capital stock under the provisions of the revenue law of the State of Kentucky; but I simply decide that the law, as it stands on the statute books, does not violate either the Federal or the State constitution.

The demurrers in this case (No. 250) and in cases ##249, 251, and 194 should be sustained, and it is so ordered.

JNO. W. BARR.

Said opinion is endorsed as follows, viz:

Western Union Telegraph Company *vs.* L. C. Norman, auditor, &c. Opinion on demurrer. Filed June 8th, 1896. W. J. Chinn, clerk.

46 On a day following, to wit, on the 18th day of July, A. D. 1896, the following orders were made and entered herein, viz:

LEVY C. WEIR, Pres. Adams Ex. Co., Complainant,
vs.
L. C. NORMAN, Auditor, Defendant. } 246.

The amended bill tendered by complainant herein on the 8th day of June, 1896, having been considered by the court, it is now ordered that same be, and is hereby, filed. Thereupon came defendant, by counsel, and renewed his demurrer to the bill as amended.

The court, having considered said demurrer of the defendant to the bill as amended, files an opinion herein, and it is adjudged and ordered that said demurrer be and is sustained, and that said injunction heretofore granted be dissolved and complainant's bill be dismissed with costs.

Thereupon came the complainant, by counsel, and presents his petition for appeal to the Supreme Court of the United States, and also his assignments of error, and the appeal is allowed in open court, and the appeal and supersedeas bond is fixed at twenty thousand dollars, which bond is now approved by the court, and upon the further application of the plaintiff it is ordered that the order dissolving the injunction be, and the same is hereby, suspended, pending the appeal, until or unless otherwise ordered by the Supreme Court, and the supersedeas bond given and approved herein shall cover any damages that may be occasioned by reason of the suspension of the order dissolving the injunction.

47 Said amended bill tendered June 8th, 1896, and filed by order of court on July 18th, 1896, is in words and figures as follows, viz:

United States Circuit Court for the District of Kentucky.

LEVI C. WEIR, Pres. Adams Express Co., Complainant,
vs.
L. C. NORMAN, Auditor, Defendant. } = 246.

The plaintiff, by leave of court for amendment of its bill, says that a large amount and proportion of the moneyed capital of the Commonwealth is employed in mining, manufacturing, commercial, and other corporations which are not embraced under article- 3 and 4 of said act of Nov. 11th, 1892, and that a large amount and proportion of the moneyed capital in the Commonwealth is employed by individuals and copartnership- in manufacturing, commercial, and other business that are not taxed under article- 3 and 4 of said act; that such corporations, persons, and copartnerships, employing together, as the plaintiffs believe- and charges, one-half or more of the moneyed capital of the Commonwealth, are taxed only upon the basis of the cash and selling value of their tangible property and the amount of their monies and credits, and wholly without reference to the earnings, profits, income, earning capacity, or good of their business. So that the amount by which the assessment against the plaintiff's company under articles 2 and 3 of said act is increased by the assessment made against — under article- 3 and 4 (of which alone the plaintiff complains), if the same can be regarded as a property tax, is a tax levied against the plaintiff's company and the other companies mentioned in sec. 4077 only, and is therefore in contravention of sections 171, 172, and 174 of the con-
48 stitution of Kentucky and of the 14th amendment of the Constitution of the United States.

LAWRENCE MAXWELL, JR.,
STONE & SUDDUTH,
Counsel for Compl'ts.

Said opinion filed by order of court on July 18th, 1896, is in words and figures as follows, viz:

United States Circuit Court.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
L. C. NORMAN, Auditor, Defendant. } No. 250 & 246. Opinion on the Demurrer to the Bill as Amended.

The bill as amended does not change the question decided on the original bill, but as the amendment alleges that there is a large amount of moneyed capital in the State employed in mining, manufacturing, commercial, and industrial pursuits by corporations whose intangible property, at least in part, is not taxed under the Kentucky statutes, it is proper that we should indicate our construction of those statutes. The language of section 4077 is: "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express

company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and also every other like company, corporation, or association, and every other corporation, company, or association having or exercising any special or exclusive
49 privilege or franchise not allowed by law to natural persons or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised."

We think the words in this section, "also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service," must include all corporations and cannot be confined to those corporations which are *are* of a like character as those specially named. If this be not so, the words "also every other corporation, company, or association" in this section are meaningless, as the preceding words, "every other like company, corporation, or association," had theretofore been expressly included. If this construction be the correct one, then there is no discrimination between monied capital employed by corporations in mining, manufacturing, commercial, and other industrial pursuits and that employed in railroads, telegraph companies, express companies, and other like companies, but the intangible property of all corporations is taxed and taxed at the same rate. It is true that the provisions of section 4077 and 4078 do not apply to all individual tax-payers, but a reference to 4020 of the Kentucky statutes and the schedule which must be returned by each tax-payer, provided by section 4058, indicate, we think, that there is no intention on the part of the State to exempt individual tax-payers from a tax upon any of their intangible property, whatever that may be. In the description of property
50 tax in the schedule, the first eleven articles required to be returned by the tax-payers generally are of intangible property, and, under the head of miscellany, the value of all property not mentioned specially is required to be returned. It is true that the mode of the assessment of intangible property of corporations, companies, and associations mentioned in section 4077 and that of individual tax-payers is different under the statutes, and it is perhaps true that the intangible property of these corporations and associations may be in some respects different from intangible property which belongs to individual tax-payers and which is taxed, but I see nothing in the statutes which exempts any intangible property owned by any corporation or any individual tax-payer which is taxed when owned by any other corporation or individual. Although, as indicated in the original opinion, we do not think that a tax levied upon intangible property is strictly a franchise tax, though called so in the statute, but a property tax, yet it is quite clear that the value of the franchise is intended to be esti-

mated as intangible property. The 172 section of the constitution declares: "All property not exempt from taxation by this constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair and voluntary sale." Thus a fair cash value and the mode of estimating such valuation is fixed by the constitution itself; but this constitutional rule of valuation of property for an ad valorem tax does not prevent the legislature from prescribing the mode or method of ascertaining the different kinds or quantities of taxable property belonging to the several tax-payers, whether they be natural or artificial persons;
51 nor does it prescribe how or by whom the assessment for taxation shall be made, except as to the valuation. All else as to the mode of assessment, we think, is left within the discretion of the law-making power. Thus an assessment may be made by one assessor or by a board of assessment and valuation and may be made in any manner that is just and equitable.

Neither does this section or any other provision of the constitution confine the levy of an ad valorem tax to tangible property, but as decided by the Kentucky court of appeals, in Levi against The City of Louisville, 16th Kentucky Law Reporter, page 872, it does require the levy of an ad valorem tax upon personal property as well as real estate, and this case decides that a license tax, which is not a property tax, cannot be substituted for an ad valorem tax upon personal property engaged in certain commercial persuits in the city of Louisville. It does not decide that section 171 of the constitution, which declares that taxation shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, applies to taxation based upon income, license, or franchise. If there is any intimation upon the subject in this case, it is that taxation which is based upon income, license, or franchise may be classified by the legislature; and as to licenses, they may be levied upon some employments and occupations and not upon others. If, however, we are correct in our construction of the Kentucky statutes, there is no ground for contending that there is a want of uniformity in the levy of the taxes against the defendant, even though section 171, requiring uniformity of taxation upon all property subject to taxation, apply to taxation based upon income, license, or franchise,
52 and is given its broadest possible construction. If we are correct in our view, it is not necessary for us to consider whether the Kentucky constitution (sec. 171–174) requires a taxation upon all property, tangible or intangible, within the territorial limits of the authority levying the tax and at a uniform rate, or only require a uniform rate of taxation upon a class of property made subject by law to taxation within the taxable limits; nor is it necessary to consider whether, if the rule of universality and uniformity applies to an ad valorem tax, it also applies to taxes based upon income, license, and franchise.

The demurrer to the bill as amended should therefore be sustained, and it is so ordered.

July, 1896.

JNO. W. BARR.

Said petition for appeal and assignment of errors presented in open court by complainant on July 18th, 1896, was and is in words and figures as follows, viz:

United States Circuit Court, District of Kentucky.

L. C. WEIR, President of Adams Express Company, Complainant, *vs.* L. C. NORMAN, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendant.	≠ 246. Petition for Appeal and Assignment of Errors.

The plaintiff prays an appeal to the Supreme Court of the United States from the decree sustaining the demurrer to the original bill, and also sustaining the demurrer to the bill as amended, and assigns for error that the court erred in sustaining the demurrer to the original bill and in sustaining the demurrer to the bill as amended and in dissolving the preliminary injunction and in dismissing the bill.

The plaintiff insists that the tax complained of and the
53 statutes of the Commonwealth of Kentucky under which the same is levied are in contravention of the Constitution of the United States, and especially of the interstate-commerce clause of section 8, article 1, and of section 2, article 4, of the Constitution of the United States, and of section 1, article 14, of the Constitution of the United States, which last-mentioned article is commonly known as the fourteenth amendment to the Constitution of the United States.

And the plaintiff further insists that the statutes of the Commonwealth of Kentucky, under which the tax is levied, are in contravention of the constitution of the Commonwealth of Kentucky, and they therefore deny to the plaintiff the equal protection of the laws.

The plaintiff prays for an order continuing the temporary injunction pending the appeal to the Supreme Court of the United States.

LAWRENCE MAXWELL, JR.,
STONE & SUDDUTH,
Counsel for Plaintiff.

Said petition for appeal and assignment of errors is endorsed as follows, viz:

≠ 246. United States circuit court, district of Kentucky. L. C. Weir, president, &c., *vs.* L. C. Norman, auditor, &c. Petition for appeal and assignment of errors. Filed Jul- 18, 1896. Walter G. Chapman, clerk.

Said appeal and supersedeas bond, approved by the court on July 18th, 1896, is in words and figures as follows:

54

Supersedeas Bond.

Know all men by these presents that Levi C. Weir, president of the Adams Express Company, as principal, and Silas F. Miller and H. M. Burford, as sureties, are held and firmly bound unto L. C. Norman, auditor of public accounts for the Commonwealth of Kentucky, in the sum of twenty thousand dollars ($20,000); the payment of which, well and truly to be made, they bind themselves, their successors, administrators, and executors, jointly and severally, by these presents.

Done this eighteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Levi C. Weir, president of the Adams Express Company, has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the circuit court of the United States for the district of Kentucky in the case of Levi C. Weir, president of the Adams Express Company, *vs.* L. C. Norman, auditor of public accounts of the Commonwealth of Kentucky, numbered 246 on the docket of said court:

Now, therefore, the condition of this obligation is such that if the said Levi C. Weir, president, shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEVI C. WEIR,
President of Adams Express Co.,
By W. A. SUDDUTH, *Attorney.*
SILAS F. MILLER.
H. M. BURFORD.

55 Sealed and delivered and taken and acknowledged this 18th day of July, 1896, before me—

HENRY F. CASSIN,
U. S. Commissioner.

Approved by—
JNO. W. BARR, *Judge.*

Said bond is endorsed as follows, viz:
246. United States circuit court, district of Kentucky. Levi C. Weir, president, &c., *vs.* L. C. Norman, auditor, &c. Supersedeas bond. Filed Jul- 18, 1896. Walter G. Chapman, clerk.

On a day following, to wit, on the 29th day of July, A. D. 1896, the following citation was filed in the clerk's office of this court, viz:

No. 246.

UNITED STATES OF AMERICA,
District of Kentucky, Sixth Judicial Circuit, } *ss:*

To L. C. Norman, auditor of public accounts for the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a ses-

sion of the United States Supreme Court, to be holden at the city of Washington, on the 14th day of August next, pursuant to an appeal granted by the circuit court of the United States for the district of Kentucky, wherein Levi C. Weir, president of the Adams Express Company, is appellant and you are respondent, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of July, in the year of our [SEAL.] Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twenty-first.

JNO. W. BARR, *Judge.*

Said citation is endorsed as follows, viz:

Service of the within citation is hereby acknowledged this 27th day of July, 1896. Wm. J. Hendrick, attorney for Common-
56 wealth of Kentucky. W. S. Taylor, attorney general of Commonwealth of Kentucky. 246. Levi C. Weir, pres't, *vs.* L. C. Norman, &c. Citation & copy. Filed Jul- 29, 1896. Walter G. Chapman, clerk.

57 UNITED STATES OF AMERICA, } *ss:*
District of Kentucky, }

I, Walter G. Chapman, clerk of the circuit court of the United States for the district of Kentucky, at Frankfort, Kentucky, do hereby certify that the foregoing 56 pages, hereto attached, contain a true and complete copy of the record and all the proceedings in the action wherein Levi C. Weir, president of the Adams Express Company, was the complainant and L. C. Norman, auditor of public accounts of the Commonwealth of Kentucky, was the defendant, as the same now appears on file in my said office.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Frankfort, Kentucky, this 1st day of August, 1896.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN, *Clerk.*

Endorsed on cover: Case No. 16,365. Kentucky C. C. U. S. Term No., 586. Levi C. Weir, president of the Adams Express Company, appellant, *vs.* L. C. Norman, auditor of public accounts for the Commonwealth of Kentucky. Filed August 14th, 1896.

U. S.
OCT 10 1896

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 586.

LEVI C. WEIR, President of the Adams Express Company, Appellant,

vs.

L. C. NORMAN, Auditor of Public Accounts of the Commonwealth of Kentucky, Appellee.

MOTION TO ADVANCE AND SET FOR HEARING.

Counsel for appellant and appellee unite in the motion to advance this case and set it for hearing with the cases of Henry Sanford, president of the Adams Express Co., appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio, *et al.*, No. 337, and The Western Union Telegraph Co., appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio, No. 352, and Henry Sanford, president of the Adams Express Co., appellant, *vs.* Ebenezer W. Poe, auditor of the State of Ohio, *et al.*, No. 338, set for hearing on the 19th day of October, 1896.

This case is identical with the cases Nos. 338, 352, and 337 in principle. The question to be decided in all of these

cases and in each of them is as to whether or not the tax as alleged in the several bills of complaint is upon interstate commerce and within the inhibition of the Federal Constitution?

In the cases from Ohio the statute of May 10, 1894, is as follows:

"SEC. 2778*a*. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this State, or by any other State or country, doing business in this State, shall, annually, between the first and tenth day of May return to the auditor of State, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said company, and where located, and the value thereof as assessed for taxation; the telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and is within the State of Ohio, which lines shall include what said telegraph and telephone companies control and use under the lease or otherwise; and said board of appraisers shall, in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said returns, include therein, as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of

the business done within the State of Ohio, giving the receipts of each office in said State and the location thereof for said year."

In the cases from Kentucky the sections of the Kentucky statutes involved are as follows:

"SEC. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. The auditor, treasurer and secretary of State as hereby constituted a board of valuation and assessment, for fixing the value of said franchise * * * the place or places where such local taxes are to be paid by * * * corporations on their franchise, and how apportioned where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed upon them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require."

"SEC. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose

statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually between the fifteenth day of September and the first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest or investments, and income from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require."

"SEC. 4070. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county the statement shall in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State and in each county, incorporated city, town or taxing district and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and

conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions; Provided, that said board from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the countries where situated. The remainder thus found shall be the value of the corporate franchise subject to taxation as aforesaid."

"SEC. 4080. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed or liable to assessment, in this State, shall be the correct value of the corporate

franchise of such corporation, company or association for taxation in this State."

"SEC. 4021. If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State bears to the total length of the lines owned, leased or controlled in this State and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of the lines in the State, less the value of any tangible property assessed, or liable to assessment in such county, city, town or taxing district."

From the foregoing statement it is obvious that the cases from Ohio and Kentucky involve questions not only cognate, but almost, if not entirely, identical; and, with a view to expedite the business of the Court, no less than with the hope of the respective parties to this appeal that they may speedily know their respective rights, it is respectfully asked that the motion to advance and set for hearing with the cases indicated be granted.

LAWRENCE MAXWELL, JR.,
W. A. SUDDUTH,
Counsel for Appellant.
WM. J. HENDRICK,
Counsel for Appellee.

166-150
462

Supreme Court of the United States.

Henderson Bridge Company, ... Plaintiff in Error,

VERSUS

Commonwealth of Kentucky, . . . Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES P. HELM,
HELM BRUCE,
Counsel.

C. C. NUNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

HENDERSON BRIDGE COMPANY . . . . . *Plaintiff in Error.*

VS.

COMMONWEALTH OF KENTUCKY . . . *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This suit was instituted by the defendant in error in the Franklin Circuit Court upon a tax assessment against the plaintiff in error. The assessment was by a Board created for the purpose under the authority of a Statute, the material parts of which will be found in the appendix.

The Circuit Court sustained the assessment only in part. From that judgment both parties appealed, and the Court of Appeals—the court of final resort in the state—reversed the judgment and remanded the case for proceedings consistent with its opinion. Such proceedings were had upon the mandate that the Circuit Court sustained the assessment as made, and gave judgment as prayed. From that judgment the plaintiff in error appealed to the Court of Appeals, which affirmed the judgment.

To reverse that judgment this Writ of Error is prosecuted.

The petition of the Commonwealth stated that plaintiff in error was a corporation * * * * * "*Doing business as a Bridge Company between the city of Henderson in Kentucky and the Indiana shore, across the Ohio River*, at Henderson, Kentucky, having also the ownership and possession of nine miles of railroad connected with it in the State of Indiana, *and operated by the said defendant company.*" The petition then sets out the various steps in the assessment, and, alleging that the tax due thereon was $3,675.91, asked judgment for that amount.

The answer pleads three defenses:

First. That the franchise granted by the State of Kentucky was of no value except as used in connection with the franchises

granted by Indiana and United States, and, because they were inseparable, it could not be taxed.

Second. That the bridge was used *entirely* for the transportation of inter-state business between Kentucky and Indiana.

Third. The inequality of the tax and its onerous nature was attempted to be shown by setting out certain facts bearing upon the value of the stock, and certain averments were made to correct certain blunders made by the book-keeper of the Company in making the return required by the Act. These facts, specifically set out in the third paragraph of the answer, and admitted by the failure to deny them, are wholly ignored by the Court in its opinion, which seems to have been moved to a high state of indignation, judging from its opinion, by a misconception of the record, for which we are in no wise responsible.

ASSIGNMENT OF ERRORS.

"The Henderson Bridge Company, plaintiff in error in the above entitled cause, complains of the judgment rendered therein by the Court of Appeals of Kentucky, and for error therein assigns the following:

1st. The court erred in affirming the judgment of the Franklin Circuit Court and in sustaining the assessment sued on.

2nd. The court erred in upholding the validity of the statute of Kentucky under the authority of which the assessment was sustained, because the statute provides for the assessing of the franchise of the plaintiff in error when that franchise is so dependent upon and intermingled with a franchise granted by the United States and with a franchise by the State of Indiana as not to be separable from them, or either of them, and to be utterly worthless if separated from them or either of them.

3rd. Because the Statute of Kentucky upheld and sustained by the Court of Appeals is a regulation of commerce between the States, and as such is a violation of the Constitution of the United States.

4th. Because the Statute, by imposing on some corporations heavier burdens of taxation than others, violates the fourteenth amendment of the Constitution of the United States, which forbids any State to deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

The second assignment, as an independent ground of reversal, will not, in view of recent decisions of this court, be now relied on.

We shall discuss the third and fourth assignments of errors in the order of their statement.

INTERSTATE COMMERCE.

The tax sued on is called a franchise tax, but it is not a franchise tax in the sense that it is a charge by the state government for granting the charter or franchise. To the contrary, when the charter was granted there was no attempt made in it to in any wise impose a burden on or exact any payment for the franchise granted.

The tax in question, if it is a franchise tax, is in the nature of a tax for the privilege of doing business; and, as not a pennyworth of intra-state business is done—as every passenger and every pound of freight that is received by the plaintiff in error crosses the state line—the question is clearly presented whether it is competent to the state, under the guise of a franchise tax, the amount of which is determined by the receipts of the Company, to impose a burden on interstate commerce.

We do not, of course, question the right of the state to tax the tangible property of the plaintiff in error. This tax was promptly paid, and is not involved in this case, though if we may judge from some expressions in the opinion copied into the record, the court below seems not to have found that out. Nor do we question the right to tax the intangible property, such as choses in action, money in possession, etc., but we do question the right to tax the privilege of doing a strictly inter-state business.

The court below in its opinion on page 23 of the record, says:

"This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transport merchandise and passengers over its structure in consideration of a reasonable rate of toll for so doing. This is all; nothing more."

It is not apparent where the court finds warrant for this statement, in view of the fact that the contrary is alleged by both the plaintiff and defendant in error. The court also, on the same page, says:

"This defendant, the Henderson Bridge Co., is no more—in fact, not as much—engaged in commerce between the states as each and every railroad in the United States that any where on its line may cross from one state into another conveying freight and passengers."

We confess that it is *no more*, but insist that it is quite *as much* engaged in inter-state commerce as the railroads mentioned, the difference being that the business of the plaintiff in error is confined exclusively to inter-state traffic, while the railroad companies are engaged in both *intra* and *inter*-state business. But if the facts stated by the court; namely, that the bridge was strictly a

toll-bridge, without the right to plaintiff in error of transporting the traffic across the river with its own motive power, the court's conclusion therefrom is not sound. This very question was raised in the case of Covington etc. Bridge Co. vs. Kentucky, 154 U. S., 219, and this court said, in answer to such a contention:

"While the Bridge Co. is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce crossing the river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

In the case at bar we point to the fact, first, that both the plaintiff and the defendant in error allege that this particular bridge company was actually engaged in operating the bridge; but we also insist that a tax upon the receipts or the stock or the franchise of this company, which must in the end be paid by the commerce which passes over it, is just as much a tax and a burden upon the commerce passing over the bridge as if the bridge company were itself engaged with its own motive power, in transporting every pound of freight and every passenger.

Here, then, we have established:

First. That the plaintiff in error does an exclusively inter-state business.

Second. That the business, whether it be carried by the motive power furnished by the Bridge Company or by the railroad companies, upon the payment of tolls, is inter-state commerce.

The question presented, then, is: How far may the state burden such inter-state commerce by the imposition of a tax?

It must be admitted that the actual property of the company situated within the jurisdiction of the state, which includes the real estate and personal property, such as choses in action and money in possession, etc., may, notwithstanding the character of the property and the purposes to which it is devoted, be taxed. This court has also held in several cases, of which the Massachusetts Telegraph cases, reported in 125 U. S., 530, and 141 U. S., 40, are fair examples, that the state may, for the purpose of ascertaining the value of the franchise employed in the doing of the intra-state business, consider the whole property and its whole business and receipts, and tax such proportion of that value, thus ascertained, as the property and business within the state bears to the whole property and business. But that has always been done for the purpose of reaching that part of the intangible value employed in doing the business within the state, and therefore subject to the tax jurisdiction of the state. An instructive case on this subject is the Postal Telegraph Cable Co. case, 155 U. S., 695.

In that case the tax was sustained, but upon the ground that the legislative purpose was to regulate the amount of the tax by the value of the property situated in and protected by the state. But we do not know any case in which a tax on the franchise of a corporation engaged *solely* in inter-state business has been sustained by this court.

In the case of Gloucester Ferry Co. vs. Penna., 114 U. S., 196, the State of Pennsylvania undertook to tax the stock of the Gloucester Ferry Co., which did business between Pennsylvania and New Jersey, and which held property in Pennsylvania for the purpose of carrying on the business. The amount of the tax was rated by the dividends declared, and imposed on the capital stock. The Company did no business within the state of Pennsylvania. The attempt evidently was to value the right to do the business on the shores of Pennsylvania and tax that value. The taxing of the stock was merely the means of reaching the end. But as the tax, in substance and in fact, rested entirely upon inter-state business, it was held invalid. "If such a privilege tax" said the court, "could be levied, the amount of it would rest entirely in the discretion of the state."

In the case of Philadelphia Steamship Co. vs. Pennsylvania 122 U. S., 326, the attempt was made by Pennsylvania to tax one of its own corporations. The tax was levied under a statute the material part of which was as follows:

"That every railroad company, canal company, steamboat company, slack-water navigation company, transportation company, street passanger railway company, and every other company, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state, and doing business in this commonwealth, and owning, operating, or leasing to or from another corporation or company any railroad, canal, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every telegraph company incorporated under the laws of this or any other state, and doing business in this commonwealth, and every express company, and any palace-car and sleeping-car company, incorporated or unincorporated, doing business in this commonwealth, shall pay to the state treasurer, for the use of the commonwealth, a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business."

The defendant pleaded that it was a steamship company "operating sea-going steamships engaged in the business of ocean transportation between different States of the United States and between the United States and foreign countries, and that all the said steamships of the said defendant were duly enrolled

or registered under the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts so returned to the Auditor General, upon which a tax had been levied by the Commonwealth of Pennsylvania, were received by defendants for freight and passengers carried in the said steamships on the ocean and on the navigable waters of the United States, between the State of Pennsylvania and other States of the United States, and between the States of the United States and foreign countries, and for the charter and hire of the said steamships to other parties in such trade and business, and that no part of the said gross receipts was received for the transpsrtation of freight and passengers between places within the State of Pennsylvania, or for the hire and use of the said steamships within the State of Pennsylvania."

Upon the trial, the facts were agreed, substantially supporting the plea. In this court the Attorney General for Pennsylvania contended in substance that the relation of the corporation to the state certainly affected the question at issue; that a domestic corporation was the creature of the state, a resident of the state, and derived its privileges from the state. He conceded that a foreign corporation, deriving its franchise from extra territorial authority, was not subject to taxation, except upon its tangible property, the situs of which was within the limits of the taxing state; but he insisted that the tax in question was sustainable upon the assumption that it was a tax upon the franchises of the corporation, such corporation being the creature of the taxing power, having its place of business within the limits of the state creating it, and its franchises being a valuable interest property or commodity, subject to taxation. He insisted that the state might tax the franchises of a corporation by an arbitrary rule, and however arbitrary or capricious the method might be, it was a mere matter of legislative discretion; that a tax upon a corporation might be graduated upon income received, as well as upon the value of the franchise granted or the property it possessed. He insisted that the fact that the plaintiff in error in that case used vessels and navigated the natural highways of the country made it no less liable to a corporation tax than if it were a railroad company, and insisted that his position was not affected by the fact that the tax might indirectly or ultimately affect the commerce carried on, or the instrument used. He insisted that the employment of the vessels in trading along the coast and with foreign ports did not take away the liability of the fronchises of the corporation to be taxed where the property is regarded as situated, any more than the employment of its vessels outside of the limits of the state would deprive that state of the power to tax them as other species of personal property of the same owner. The corporation, he said, owns vessels, and it owns its franchise as a corporation; these are two kinds of personal

property, and each is taxed as such without regard to the fact that it is involved in and devoted to the pursuit of inter-state and foreign commerce.

In answer to this argument, this court, through Mr. Justice Bradley, said:

"The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which in this case is the business of transportation in carrying on inter-state commerce—it would clearly be unconstitutional."

It will be seen that this court distinguishes between a tax on the corporate franchise—the right to exist—and a tax on the franchise of doing business; and the test laid down upon which the distinction is solely made to rest, is that the statute seeks to impose a similar tax on foreign corporations. If exactly the same test should be applied in this case, it will be seen that the franchise tax here sought to be imposed is imposed on all corporations, without reference to the state of incorporation. In the same section are mentioned railway companies, banks, bridge companies, telegraph companies, telephone companies, palace car companies, dining car companies, and a number of other corporations not incorporated by this State at all, without the slightest distinction between them. The only distinction found in the statute at all is in the subsequent section, which prescribes a different method of ascertaining the value of the franchise, when the corporation is one chartered by and organized in another State.

Thus we see, by the test laid down by this court, the tax in this case is a franchise or privilege tax for doing the business of the plaintiff in error, which, as we have said, is a wholly inter-state business.

An equally direct authority on this point is the case of Levi vs. City of Louisville, 16 Kentucky Law Rep., 877. In that case it was contended that the Constitution of the State authorized the Legislature to diversify the method of taxation and to apply to the different species of property, that method of taxation best calculated to reach it, the ad valorem system to certain classes of property, the license system to others, and the franchise system to others; but the Court of Appeals held that the present Constitution, differing from the old Constitution, required all property, real and personal, to be first subjected to the hard and fast rule of an ad valorem tax, and that the income license or franchise tax, if levied, should be in addition to the ad valorem tax. The court at

page 874 says: "There is but one general system of assessment as to all property under the present Constitution for the purposes of government, whether State or municipal, and in addition taxation may be based on income, on licenses and on franchises, and a head or poll tax."

Again on page 877, the court said:

"The Convention doubtless saw, after they had adopted a general system for assessing and taxing property, that the Legislature should be clothed with a power that might be required to be exercised *in imposing burdens for the exercise of mere privileges* under the police power of the State, and that such intangible rights as that of *franchises* and incomes should be made the subject of taxation. And, therefore, provided in Section 174, that nothing shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises, and while this character of tax might be upheld even without express constitutional authority, it was doubtless felt best to be more specific on the subject." (Our italics.)

It is entirely apparent from this case that the Constitution, as construed by the Court of Appeals, limits the power of the Legislature to impose a tax based on incomes, licenses or franchises to the imposition of a mere privilege tax as a means of arriving at that intangible value possessed by individuals or corporations derivable principally from the earning power.

Assuming the tax, then, to be a tax on the franchise to do the business, which is purely inter-state commerce, we have a tax which this court says "would be clearly unconstitutional."

The Pennsylvania Steamship case has never been overruled or doubted by this court, nor has the Gloucester Ferry Company case, but they have been repeatedly cited with approval.

With some hesitation, because we do not believe it to be essential to the legal question involved, we look in this connection into the extent of the burden imposed by the tax in this case upon the commerce of the Company.

The Company issued $1,000,000 of stock and $2,000,000 of six per cent. mortgage bonds, and sold the whole block of bonds and stock for $1,600,000, which was eighty per cent. of the par value of the bonds. This being alleged in the answer and not denied, stands admitted of record. To these proceeds there should be added $79,579 which the Company expended in addition to the proceeds of the bonds, making a total expenditure of $1,679,579. From this sum must be taken $119,731, for interest paid upon the bonds during the construction of the bridge and before it was in the possession of any income from its business. There must also be taken $100,000 loss on account of deterioration in plant and the opening of quarries which yielded nothing. This

is alleged in the answer and not denied. Thus it will be seen that at the outside only $1,459,849 of this money added any value whatever to the bridge structure. With this amount the bridge and approaches were built. The approach on the Kentucky side is only a few feet, but the approach on the Indiana side is over nine miles in length. Two-thirds of the bridge proper is in Kentucky and one-third in Indiana. No separate account was kept of the cost of the different parts of the structure, but if it be assumed, as may fairly be done, that about half of the value is within and half without the jurisdiction of the State, which about corresponds with the assessment of the tangible property in the two States, the Kentucky assessment being at $649,735, while the Indiana assessment is at $627,660, it would seem that not more than one-half of the value is subject to the tax jurisdiction of Kentucky.

The combined assessment of the two states on the tangible property of the plaintiff in error is $1,277,395, which is a greater percentage of the value than other property in the state is assessed at, and greater than is contemplated by the Statutes of Kentucky. See Sec. 4274, Kentucky Statutes; appendix page 22.

It is admitted that the Statutes of Kentucky confer on the local authorities of the respective counties jurisdiction to assess and fix the value of the tangible property of all bridge companies and other corporations, with a few exceptions; but such local authorities have not the right to assess the franchises or stock of any corporation. The jurisdiction to do this is conferred by the Statute quoted in the appendix upon a Board of Valuation and Assessment, composed of the Auditor, Treasurer and Secretary of State, whose sessions are held at Frankfort, the seat of the State government. The theory is that the local authorities being more familiar with local values, are best fitted to assess the values on tangible property situated within their respective jurisdictions. Levi vs. Louisville, 16 Ky. Law Rep., 876.

The only duty conferred on the Board of Valuation and Assessment is to fix the value on the franchises of corporations, and the means which appears to be pointed out by the Statute of arriving at those valuations is to ascertain the value—real value—of the capital stock, and if that exceeds the assessed value of the tangible property, as fixed by the local authorities, the difference between these shall be set down for assessment as the value of the franchises. See Sec. 4079; appendix, page 20.

In order to ascertain the value of the stock, the Statute declares that the Board may, among other things, consider the amount of the gross and net earnings of the company, and the evidence in this case shows that the value in this case was based almost, if not exclusively, upon a consideration of the amount of the receipts, gross and net, derived from this inter-state commerce.

The actual value was arrived at in this way: the Board valued

the stock at ninety per cent of its par value, namely, $900,000, and added thereto the par value of the mortgage bonds, namely, $2,000,000, and thus arrived at the assessed value of $2,900,000. Record, page 18.

It is true, the Auditor in his testimony (record, pages 13, 14, 15, 16), tries to avail himself of an oversight or blunder of the bookkeeper of the company in making up the report, which, however, was corrected before the Board of Valuation and Assessment, and the real facts concerning the mistake were set out in the answer and confessed by the Commonwealth by its failure to deny. But, as we have said, the real basis of assessment is shown on page 18 of the record, where it is admitted that the value was arrived at in the way here stated; namely, by adding to the value of the stock, the par value of the bonds; and this large valuation was attempted to be sustained by the statement that it was shown that the receipts of the plaintiff in error were sufficient to pay interest on the bonds at six per cent. and a dividend on the stock of over seven per cent. per annum. This statement, which is also made use of by the court, was based on most manifest errors, which we will speak of presently.

That the tax so sustained was in substance and effect a tax upon the receipts of the company is made quite plain from the opinion of the court:

"It may also be observed in the simple fact that the market value of the stock of the company is in the aggregate $900,000, when we know that the bonds taking precedent of the stock in the sum of $2,000,000 must be good, otherwise the stock could have no value, and thus that the property and franchise must be worth the $2,900,000. Again it is shown that the annual gross income for the year preceding this valuation was $217,072.21, enough to pay an annual interest on both bonds and stock of more than seven per cent., or, making another estimate, this $217,072 would pay an annual interest on the value of the tangible property as taxed in Indiana and given in to the county of Henderson of nearly seventeen per cent. So that the large *earning capacity* of this property, based on its tangible value only, authorizes us to assume that it *lies in its franchise, which is the right to charge tolls on every locomotive, freight and passenger car, ton of freight, and passenger that passes over its road*, and this rate of toll is practically up to this time in the discretion of the company, the legislature not having undertaken to limit or control same and make same reasonable." R. 29 (our italics).

The court, in construing this statute, allowed the Board of Assesment to ignore wholly the par value, the real value and the market value of the stock, and to place an *arbitrary* value on it for the purposes of taxation—in this case confessedly more than three times the real value of the stock. If this can be done, where

is the limit to which the State may go in its exactions upon the receipts of the company and its burdens upon the stock-holders, who are the real people engaged in this inter-state commerce?

While it is not material in this case, except to show the injustice of the burden, yet it is perfectly apparent that both the Board and the court were guilty of the most manifest errors in making the calculations as to what dividend could be paid on the stock from the company's receipts. They found that the gross receipts amounted to $217,072.21. From this was deducted $120,000, interest on the bonds, and $21,000 which, under the mortgage, the company was obliged to set apart for the ultimate redemption of the bonds at maturity; and thus they arrive at what they call a net profit of $76,072.21, which they assume may all be applied to the payment of dividends on the stock, and which, on $1,000,000 of stock they say, would amount to more than seven per cent. But it is evident that no allowance is here made for the cost of operation, one item of which is the tax on the tangible property in this State and in Indiana, already paid, and amounting to about $20,000. If the present franchise tax is sustained, and Indiana should abstain from levying a similar tax, still the net income would be reduced, by the taxes only, to the sum of $41,839. If Indiana should, however, assert its right to levy a franchise tax, it is perfectly evident that the receipts of the company will not be sufficient to pay the interest on the bonds and the operating expenses, including the tax. It is practically spoliation, even under existing circumstances.

This case presents an apt illustration of the wisdom of the statement made by this court, through Mr. Justice Bradley, in the case of California vs. Pacific R. R. Co., 127 U. S., page 41:

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."

We supposed, from our consideration of the Statutes, that the Legislature intended to prescribe a method of arriving at the value of the franchise and intended to tax that value which belonged to the stockholders, which might be found from a true ascertainment of the value of the capital stock, less the assessed value of the tangible property, where the value of the stock exceeded the assessed value of the tangible property; but the Statute, as now construed by the court of Appeals, removes every restriction upon

the Assessing Board, and places that Board exactly where it would be if there had been no attempt at defining the method of arriving at the value of the franchise. The quotation, therefore, made is entirely applicable to the attempt upon the part of the State in this instance to tax the franchise, considering the Statute as interpreted by the Court of Appeals.

Without further protracting the argument upon this branch of the case, we insist that the tax in this case is a tax upon the franchise or privilege of doing a purely inter-state business, and, as such, is unconstitutional; that a large part of the value arrived at by the Board was in addition to the choses in action and money on hand, is perfectly apparent from the facts alleged in the third paragraph of the answer, the truth of which stands confessed upon the record. This brings us to a con-sideration of the fourth assignment of error—that the Statute in this case, as interpreted by the Court of Appeals, violates the fourteenth amendment to the Constitution of the United States, which forbids any state to deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTE IN QUESTION DENIES TO CERTAIN CORPORATIONS, INCLUDING PLAINTIFF IN ERROR, THE EQUAL PROTECTION OF THE LAWS.

It has been held that corporations come within the protection of the Fourteenth Amendment to the Federal Constitution. Railroad Tax Case, 13 Federal Rep., 738: County of Santa Clara vs. Southern Pacific R. Co., 18 Fed. Rep., 385.

The same cases hold that the constitutional guaranty of the equal protection of the laws forbids unequal exactions of any kind and among them that of unequal taxation. In the first case mentioned, at page 733, the court says:

"The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it can not deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to everyone on similar terms—in his life, his liberty, his property and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

"Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid."

And on page 734 it is said:

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection which the amendment requires the State to extend to every person within its jurisdiction."

On page 735, quoting with approval Exchange Bank of Columbus vs. Hines, 3 Ohio St. 1, the court declared that uniformity in taxing implies EQUALITY IN THE BURDEN OF TAXATION.

On the subject as to whether the fourteenth amendment protects corporotions, the court at page 738 used this language:

"Is the defendant, being a corporation, a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? The learned counsel of the plaintiff, and the Attorney General of the State, take the negative of this question, and assert with much earnestness that the amendment applies, and was intended to apply, only to the newly made citizens of the African race, and should be limited to their protection." The learned judge then proceeds to discuss the question at length, and refuses to give the provision the narrow construction contended for, and holds that corporations come within the protection of the amendment.

The quotations made are from the opinion of Mr. Justice Field on the circuit.

In the last case, speaking of the right of corporations to protection, the court said:

"But in truth the State possesses no such arbitrary power over the property of corporations. When allowed to acquire and own property, they must be treated as owners, with all the rights incident to ownership. They have a constitutional right to be so treated. Whatever power the State may possess in granting or in amending their charters, it can not withdraw their property from the guarantees of the federal constitution."

The last case was decided by the same two judges who decided the first named case, viz: Justice Field and Judge Sawyer, and is in exactly the same line as the first case, and both of them distinctly hold to the propositions stated.

These propositions being established, the question is, do they apply to the case at bar. With a view of testing this question let us look with some detail into the facts. We maintain:

First. There is not an equality of burden between individuals and corporations of the class mentioned in Section 4077, appendix page 19.

Second. We maintain that there is not uniformity of burden between the corporations mentioned in that section and other corporations not mentioned and not falling within the purview of the language of that section.

While we recognize that this court will not pass upon the question as to whether or not the Statute in question is violative of the provision of the State Constitution, still it is instructive in determining whether the statute violates the constitutional provisions which guarantees uniformity of burden, to look to the section of the State Constitution which undertakes to provide for that equality of burden. It is Section 174 of the Constitution. It declares "that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

The Court of Appeals held in Levi vs. Louisville, 16 Ky. Law Rep. 872, that all property real and personal should be subjected to an ad valorem tax, and then that a tax in the nature of income, franchise or license might be exacted as an additional burden. The presumption is that after all property real and personal, which takes in all imaginable kinds of property, has been subjected to an ad valorem tax at its fair cash value, it has all, whether belonging to natural or artificial persons, been subjected to the same burden and therefore it should follow that any additional burden laid under the form of either of the kinds of tax mentioned in the section quoted, on any class of persons, can not be laid unless there is at least an attempt made to impose as nearly as practicable a similar burden on all persons and corporations, and confessedly there has been no attempt to do this in Kentucky.

Obviously the spirit of the provision quoted of the constitution is that all property whether it be the property of individuals or corporations shall bear proportionate to its value as nearly as practicable the same burdens of government. It is suggested in the opinion of the court in this case that by reason of the authority conferred by Section 174 of the Constitution on the Legislature to provide for taxation based upon income licenses or franchises that it was competent to the Legislature to tax corporations upon all their tangible property, and then in addition to tax them upon their franchises. But we call attention to the fact that the same words that contain that authority declared that the Legislature may provide for tax ation based on incomes. We do not deny the power of the Legislature to tax franchises of a corporation as between it and individuals after taxing all property under the ad valorem system at its full value,

but we say that when that is done the burden of taxation is heavier by just the amount of the franchise tax upon corporations, than it is upon individuals, unless you tax the individual upon the income or upon some license system which will equalize as nearly as practicable the burdens. The present case illustrates what we mean in this respect. The actual tangible property of the plaintiff in error consists in some very large and expensive piers and a superstructure over them. This property simply valued as stone piers and iron superstructure is practically valueless, except as there is considered in connection therewith the franchise of the corporation. If the franchise—the right to do business and to exist as a corporation—should be taken from the corporation the property would be rendered practically valueless for the purpose of the owners of the stock in that corporation.

But when that property is vitalized and appreciated by the franchise granted to the corporation, then it becomes of some value, and this value given to the property by this franchise WAS TAKEN INTO CONSIDERATION NECESSARILY BY THE LOCAL AUTHORITIES OF BOTH KENTUCKY AND INDIANA WHEN THE VALUES WERE FIXED UPON THE PROPERTIES FOR THE PURPOSES OF ASSESSMENT.

The franchise tax here sought to be imposed is a tax in addition to the tax on the assessment made by the local authorities, and means nothing more nor less than a tax upon the power of the corporation to earn money, in other words an income tax. The corporation being well managed by officers skilled in the business, yields a certain income, and is taxed practically on that income. Now in order to prevent that corporation from bearing a heavier burden than individuals, the individuals should carry a corresponding burden by being taxed upon their income, or their earning power. If this be not done, then the corporation is made to carry a heavier burden than the individual.

There is yet another view to be taken of this Statute as it affects individuals and corporations. It has been shown that the assessment in the case at bar was was arrived at by taking the value of the stock, which is the whole interest of the stockholder, at $900,000, and then adding thereto the bonded indebtedness of the company which amounts to $2,000,000, and then because it was supposed that the earnings of the company were sufficient to pay the interest on the bonds and a dividend on the stock, taking as the value of the stock $2,900,000, thus practically taxing the corporation on its indebtedness because it was supposed to be able to pay interest on that indebtedness. It was claimed by the Board, and substantially by the court that in this respect individuals and corporations were treated alike: It was stated that if an individual buys a farm for $10,000 and only pays $1,000 thereon, he is taxed on the value of his farm without allowing a deduction, and that that is substantially all that is done in this case. But the error of

this position is perfectly manifest. The corporation, as we have shown, has been taxed on its tangible property really considerably above the value contemplated by the Statute (Appendix page 22, section 4274); and after thus being taxed on the full value of its property it is made to pay an additional tax because of a debt which rests on and is secured by the property. To make the farmer's case like the present, he ought to be assessed on the full value of his farm and then on the $9,000 of debt besides. and this it cannot be pretended is authorized by the laws of the State. This confusion of ideas appears in the opinion on pages 28 and 29 of the record.

On the second branch of this part of the discussion, we maintain that the Statute produces the most manifest inequality between its several corporations. It will be observed that by the section of the Statute referred to, that the franchise tax is only imposed on the corporations named and included in section 4077, Appendix page 19. There are in the State a great number and variaty of corporations not included within the words of the Statute, and who have not as a matter of fact ever been assessed upon any franchise, and who have never been called on to pay a franchise tax. The Statute as originally drawn simply included all corporations, but there being great opposition from a number of corporations was finally changed to its present form. No State court has ever held, within our knowledge, that that section includes the right to tax the franchises of all the corporations within the State, though the Circuit Court of the United States for the Sixth Circuit has held in one or more of the cases heard with this case, that under the Statute the franchises of all corporations could be taxed. We respectfully insist that this ruling is not sustained by either the language or the history of the Statute. If such had been the intention of the law making power there would have been absolutely no perceptible reason why all of the corporations named should have been specifically named, and why the general phrase of the section should have been so limited in its scope. It would have been entirely sufficient if that had been the purpose of the law making power, simply to have declared that the franchises of all corporations organized under or doing business in the State should be taxed in the manner prescribed. But the Legislature did not see fit to do that, but only imposed that form of taxation on the corporations named and coming within the purview of the Statute. We do not see how there can be very much doubt considering the language of the Statute, without reference to its history, that it was the distinct purpose of the Legislature to require a franchise tax from certain corporation and not to require it from certain others, but as supporting this interpretation we cite as having very material weight, the practical construction placed upon this Statute by the executive officers of the State who have for several years construed the law to apply only to the cor-

porations named, and not to apply to the great number of corporations not named in the Statute. Such a construction is entitled to great weight. Upon this question we cite the following authorities:

Barbour vs. Louisville, 83 Ky., 95.
Harrison vs. Commonwealth, 83 Ky., 162.
Hastings &c. R. R. Co. vs. Whitney, 132 U. S., 366.
Heath vs. Wallace, 138 U. S., 582.
United States vs. Alabama R. R. Co., 142 U. S., 621.

CONCLUSION.

In conclusion we respectfully submit that the judgment below should be reversed, because:

First. The plaintiff, in error, having been taxed under the *ad valorem* system upon all of its property, real and personal, is now subjected to a privilege or franchise tax to engage in the business in which it is occupied, and that as that business consists entirely of inter-state commerce, the tax amounts to a burden upon and a regulation of inter-state commerce.

Second. Because the tax levied in this case is just that much additional burden upon the corporations named in the Statute in question, more than is imposed upon individuals or other corporations not included within the terms of the Statute; and is therefore in violation of the fourteenth amendment of the constitution which guarantees to every person equal protection of the laws.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

AUTHORITIES CITED AND REVIEWED.

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Mass. Telegraph Cases, 125 U. S., 530, and 141 U. S., 40.
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Harrison vs. Commonwealth, 83 Ky., 162.
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Heath vs. Wallace, 138 U. S., 582.
United States vs. Alabama R. Co., 142 U. S., 621.

APPENDIX.

CONSTITUTIONAL PROVISION.

§ 174. Corporate, to be taxed like individual property—incomes —licenses—franchises. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

STATUTORY PROVISIONS.

§ 4077. Franchise taxed—board of valuation to determine where tax shall be paid. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

§ 4078. Franchise—reports by corporations to determine value. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and

trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

§ 4079. Franchise—reports if lines extend beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government; or organized and incorporated in .this State, but operating and conducting business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence, as it may have, if such

corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company orassociation, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainded thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

§ 4080. Foreign corporations—value of franchise how determined. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

§ 4081. Franchise of carrier, when taxed in each district, through which line passes. If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State ; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district, through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district.

§ 4082. Franchise of persons engaged in certain business—how value determined. Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such

person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

§ 4083. Notice to corporations of value of franchise—board may change. It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of such fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence the board may change the valuation as it may deem proper, and the action of the board shall be final.

§ 4084. Value of franchise to be reported to counties entitled to tax. The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

EQUALIZATION STATUTE.

§ 4274. Percentage of value to be fixed on real property—report to county judges—witnesses. The said Board of Equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said standard. The secretary of the State Board of Equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts.

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Supreme Court of the United States.

No. 586.

LEVI C. WEIR, PRESIDENT OF THE ADAMS EXPRESS COMPANY, APPELLANT,

vs.

L. C. NORMAN, AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY.

No. 462.

THE HENDERSON BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

"The substance and not the shadow determines the validity of the exercise of the power."

Chief Justice Fuller in Telegraph Cable Co. vs. Adams, 155 U. S., 689.

BRIEF FOR THE COMMONWEALTH.

WM. J. HENDRICK,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR THE COMMONWEALTH.

These causes, Nos. 462 and 586, having been advanced and set for hearing with the appeals of the Adams Express Company and the Western Union Telegraph Company against Poe, auditor, from the State of Ohio, will be argued and briefed together for the Commonwealth of Kentucky.

The Henderson Bridge Company is a corporation created by the Commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio river between the city of Henderson, in Kentucky, and the Indiana shore. It was projected and built by the Louisville and Nashville Railroad Company and its stock is owned by that corporation.

The assignment of errors by the bridge company is as follows:

"1st. The court erred in affirming the judgment of the Franklin circuit court and in sustaining the assessment sued on.

"2d. The court erred in upholding the validity of the statute of Kentucky under the authority of which the assessment was sustained because the statute provides for the assessing of the franchise of the plaintiff in error, when that franchise is so dependent upon and intermingled with a franchise by the State of Indiana as not to be separable from them or either of them and to be utterly worthless if separated from them or either of them.

"3d. Because the statute of Kentucky upheld and sustained by the court of appeals is a regulation of commerce between the States, and as such is a violation of the Constitution of the United States.

"4th. Because the statute, by imposing on some corporations heavier burdens of taxation than on others, violates the fourteenth amendment of the Constitution of the United States, which forbids any State to deny to any person within its jurisdiction the equal protection of the laws."

The Adams Express Company is a joint stock company organized under the laws of the State of New York or, as it calls itself in these pleadings, a copartnership engaged in the express business throughout the United States, which consists in carrying for hire express packages on passenger and express trains, steamboats, and stages in the care and custody of the employés of the company.

The Adams Express Company assigns for error the following:

"The plaintiff insists that the tax complained of and the statutes of the Commonwealth of Kentucky under which the same is levied are in controvention of the Constitution of the United States, and especially of the interstate-commerce clause of section 8, article 1, and of section 2, article 4, of the Constitution of the United States, and of section 1, article 14, of the Constitution of the United States, which last-mentioned article is commonly known as the fourteenth amendment to the Constitution of the United States.

"And the plaintiff further insists that the statutes of the Commonwealth of Kentucky under which the tax is levied are in controvention of the constitution of the Commonwealth of Kentucky, and they therefore deny to the plaintiff the equal protection of the laws."

These alleged errors will be considered in reverse order as assigned.

I.

The revenue statute of Kentucky is an earnest and successful effort to equalize the burdens of taxation upon all classes of property and violates no provision of the constitution of Kentucky, but is in thorough accord with its principles and its spirit.

In order that the Court may determine from an inspection of the constitution itself this question, I incorporate herewith the sections of the Kentucky constitution of 1891 entire on the subject of revenue and taxation and corporations.

REVENUE AND TAXATION.

"SEC. 169. The fiscal year shall commence on the first day of July in each year, unless otherwise provided by law.

"SEC. 170. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and

fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location.

"SEC. 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"SEC. 172. All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law.

"SEC. 173. The receiving, directly or indirectly, by any officer of the Commonwealth, or of any county, city or town, or member or officer of the General Assembly, of any interest, profit or perquisites arising from the use or loan of public funds in his hands, or moneys to be raised through his agency for State, city, town, district or county purposes shall be deemed a felony. Said offense shall be punished as may be prescribed by law, a part of which punishment shall be disqualification to hold office.

"SEC. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value,

unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

"SEC. 175. The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party.

"SEC. 176. The Commonwealth shall not assume the debt of any county, municipal corporation or political subdivision of the State, unless such debt shall have been contracted to defend itself in time of war, to repel invasion or to suppress insurrection.

"SEC. 177. The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway.

"SEC. 178. All laws authorizing the borrowing of money by and on behalf of the Commonwealth, county or other political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose.

"SEC. 179. The General Assembly shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads: Provided, if any municipal corporation shall offer to the Commonwealth any property or money for locating or building a capitol, and the Commonwealth accepts such offer, the corporation may comply with the offer.

"SEC. 180. The General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding one dollar and fifty cents per head. Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

"SEC. 181. The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.

"SEC. 182. Nothing in this constitution shall be construed to prevent the General Assembly from providing by law how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And until otherwise provided the present law on said subject shall remain in force."

CORPORATIONS.

"SEC. 190. No corporation in existence at the time of the adoption of this constitution shall have the benefit of future legislation without first filing in the office of the secretary of state an acceptance of the provisions of this constitution.

"SEC. 191. All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization

shall not have taken place, and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter be void and of no effect.

"SEC. 192. No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat.

"SEC. 193. No corporation shall issue stock or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time said labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void.

"SEC. 194. All corporations formed under the laws of this State, or carrying on business in this State, shall, at all times, have one or more known places of business in this State, and an authorized agent or agents there, upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section.

"SEC. 195. The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals, and the exercise of the police powers of this Commonwealth shall never be abridged, nor so construed, as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals.

"SEC. 196. Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimina-

tion. No common carrier shall be permitted to contract for relief from its common-law liability.

"SEC. 197. No railroad, steamboat or other common carrier, under heavy penalty to be fixed by the General Assembly, shall give a free pass or passes, or shall, at reduced rates not common to the public, sell tickets for transportation to any State, district, city, town or county officer, or member of the General Assembly, or judge; and any State, district, city, town or county officer, or member of the General Assembly, or judge, who shall accept or use a free pass or passes, or shall receive or use tickets or transportation at reduced rates not common to the public, shall forfeit his office. It shall be the duty of the General Assembly to enact laws to enforce the provisions of this section.

"SEC. 198. It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.

"SEC. 199. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and said companies shall receive and transmit each other's messages without unreasonable delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control. Telephone companies operating exchanges in different towns or cities, or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination. The General Assembly shall, by general laws of uniform operation, provide reasonable regulations to give full effect to this section. Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys, and to designate

the places at which, and the manner in which, the wires of such companies shall be erected or laid within the limits of such city or town.

"SEC. 200. If any railroad, telegraph, express, or other corporation, organized under the laws of this Commonwealth, shall consolidate by sale or otherwise, with any railroad, telegraph, express or other corporation organized under the laws of any other State, the same shall not thereby become a foreign corporation, but the courts of this Commonwealth shall retain jurisdiction over the part of the corporate property within the limits of this State in all matters which may arise, as if said consolidation had not taken place.

"SEC. 201. No railroad, telegraph, telephone, bridge or common-carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common-carrier company, owning a parallel or competing line or structure, or acquire by purchase, lease or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying.

"SEC. 202. No corporation organized outside the limits of this State shall be allowed to transact business within the State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth.

"SEC. 203. No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges.

"SEC. 204. Any president, director, manager, cashier or

other officer of any banking institution or association for the deposit or loan of money, or any individual banker, who shall receive or assent to the receiving of deposits after he shall have knowledge of the fact that such banking institution or association or individual banker is insolvent, shall be individually responsible for such deposits so received, and shall be guilty of felony and subject to such punishment as shall be prescribed by law.

"SEC. 205. The General Assembly shall, by general laws, provide for the revocation or forfeiture of the charters of all corporations guilty of abuse or misuse of their corporate powers, privileges or franchises, or whenever said corporations become detrimental to the interest and welfare of the Commonwealth or its citizens.

"SEC. 206. All elevators or storehouses, where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses, subject to legislative control, and the General Assembly shall enact laws for the inspection of grain, tobacco and other produce, and for the protection of producers, shippers and receivers of grain, tobacco and other produce.

"SEC. 207. In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as he shall be entitled to vote in said company under its charter, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates, and such directors or managers shall not be elected in any other manner.

"SEC. 208. The word corporation as used in this constitution shall embrace joint stock companies and associations."

The convention that framed the constitution of 1891 for the Commonwealth of Kentucky was as representative a body of men as ever assembled in any Commonwealth of this Union to declare its organic law. That convention understood thoroughly the commission given it by the people of Kentucky. It understood and valued not only the power of the commission, but its limitations also. Evils had grown up under the constitution of 1849. Abuses of power existed. The machinery of the State government was loose and worn. The experience of forty years, covering a period of political revolution, social disorganization, moral upheaval, and corporate aggrandizement, had pointed out the necessity of a change in the constitution to suit these new phases of an advancing civilization.

The subjects of constitutional revision most prominent in the minds of the framers of that instrument are reflected truly in the mirror of the constitution itself. And these were the themes:

A remedy for the abuses of private legislation, to which we find the response in sections 59 to 60, inclusive; a new arrangement of the judicial system, met by sections 109 to 142, inclusive; new election machinery, covered by the provisions on suffrage and elections; a new scheme for municipal government, provided for under the head of municipalities; and, what was of the deepest moment, a readjustment of the tax laws, to conform to new conditions, especially in relation to corporations. The debates of the convention will show that I have stated fairly what was uppermost in the minds of the framers, and, by that same token, the greatest of these were the provisions relating to revenue and taxation.

The reasons for this are obvious to one acquainted with the situation at the time the convention assembled. Under the guise of special legislation private bills of every conceivable sort had passed the legislature, many of these containing the most extraordinary, unreasonable, and dangerous grants of power to corporations and joint stock companies, many of them already enriched by the acquisition of power under valuable grants against common right; and with inconceivable blindness these corporations had evaded, by skillful manipulation, the payment of taxes at all, in many instances, and in no instance had paid or offered to pay anything like a fair proportion of the public burden. The creation of the railroad commission had been the only affirmative step taken to equalize the burdens. The improved real estate of the Commonwealth had heaped upon its back five-sevenths of the entire load.

With such a convention facing such a situation, the provisions of sections 171 and 172 are not difficult of construction. Indeed, they construe themselves. They declare that "taxes shall be levied for public purposes only. They *shall* "*be uniform upon all property* subject to taxation within the "territorial limits of the authority levying the tax, and "all taxes shall be levied and collected by general laws."

"All property not exempted from taxation by this consti-"tution shall be assessed for taxation at its fair cash value, "estimated at the price it would bring at a fair voluntary "sale."

And by section 174, "All property, whether owned by "natural persons or corporations, shall be taxed in propor-"tion to its value, unless exempted by this constitution;

"and all corporate property shall pay the same rate of taxa-
"tion paid by individual property."

To this must be added the construction given to these sections by the Court of Appeals of Kentucky, declaring that equality and uniformity are essential to constitutional taxation.

Spalding *vs.* Hill, 86 Ky., 656.
Holtzhauer *vs.* Newport, 15 Ky. Law Rep., 188.
Norman *vs.* World's Fair Board, 14 Ky. Law Reporter, 529.

So that it is but fair to the constitution of Kentucky to say that the spirit that breathes from every line of it is that of equality and uniformity in taxation "*of all property.*"

And as touching corporations or similar associations, a fixed determination to rescue the Commonwealth from the clutch of these aspiring and greedy agencies of avarice.

In order that the Court may have the entire revenue law of Kentucky before it, in such convenient form as to make easy reference, I have appended the act in its entirety to this brief, and I invite a careful examination of the whole act, as well as the particular sections set out in the various bills contained in the records now under consideration.

A brief analysis of the act may assist the court in reach- a satisfactory conclusion upon the questions raised as to its constitutionality.

The first article contains the general provisions relating to the assessment and collection of taxes "upon all property." The provisions of sections 4019 and 4020 as touching the present inquiry are specially significant. They are as follows :

"§ 4019. An annual tax of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the Sinking Fund; twenty-two (22) cents for the support of the common schools, and one-half of one cent for the Agricultural and Mechanical College, as now provided by law, by an act, entitled "An act for the benefit of the Agricultural and Mechanical College," approved April twenty-ninth, one thousand eight hundred and eighty, including the necessary traveling expenses of all pupils of the State entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

"§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

Article second relates to the assessment of property by the assessors, to whom every natural person in the Commonwealth must give in the list of "all his property." The comprehensive scope of the word "*all*" is emphasized by an examination of section 4058. He is first examined upon oath as follows:

"No. 1. Are you, or were you, on the fifteenth day of September of the present year, executor of the will or administrator or curator of the estate of any deceased person, or guardian, committee, assignee, commissioner, receiver or trustee of any person, or have you in your possession, or under your control, any property, money or other thing of value belonging to any other person or corporation? Answer. ——. If the answer is Yes, the person is required to list such property separate from his own, and in the name of the real owner, and show by whom listed.

"No. 2. Have you, before the fifteenth day of September of the present year, either personally or through the agency of another, caused any part of your taxable money or other property to be temporarily converted, either by sale, exchange, or any other manner, into any bonds, money or securities not taxable, or any other property not taxable under the laws of this State, for the purpose of evading the payment of taxes, or have you resorted to any means or device whatever to evade the payment of taxes on any part of the property owned by you during twelve months next preceding the fifteenth day of September of the present year? Answer. ——. If the answer is Yes, the person will state all the facts connected with such transaction, and the assessor will reduce such statement to writing, and attach it to the schedule, and make a note of the fact in his books, that the attention of the supervisors may be called thereto."

The schedule of *eighty-three* items is then administered, including tangible and intangible, real, personal, and mixed, property; property in possession, reversion, or remainder; choses in action, bonds, debts, cash, stocks in all sorts of corporations, royalties, gold, silver, diamonds, steamboats, and knitting machines; annuities and slaughtered animals; wines, whiskies, and stallions—in short, everything he

has or thinks he has, "in the heavens above or the earth beneath or the waters under the earth."

And then, to make sure that the guilty tax-payer may not, after all, have concealed upon or about his person something which has escaped the searching eye of the inquisitorial assessor, the process is concluded by having him take and subscribe to the following oath:

"STATE OF KENTUCKY, } *Scilicit:*
—— *County,* }

"I do solemnly swear (or affirm) that the foregoing schedule contains a true, full, and complete list of all taxable property belonging to me on the fifteenth day of September, eighteen————, and to the best of my knowledge, belief, and judgment the value fixed by me to the various articles as above is the fair cash value thereof, estimated at the price they would bring at a fair voluntary sale, and that to the best of my knowledge, belief, and judgment none of said articles would bring any greater sum at any such sale than as stated above. I further swear that to the best of my knowledge, belief, and judgment I cannot realize any greater sum on the notes and accounts owned and held by me against others than as stated by me in said schedule, and that the answers made by me to the above interrogatories are true.

_____"

The third article relates to the assessment of corporations: First, to the assessment of corporations generally; second, to the assessment of banks and trust companies; third, to the assessment of building and loan associations; fourth, to the assessment of turnpikes.

Under the first subdivision occur the provisions upon

the objections to which are based the bills filed in these cases. The sections need not be here recited.

The fourth article relates to the assessment and payment of taxes by railroads.

The fifth article to the assessment of distilled spirits.

The sixth, seventh, eighth, and ninth articles relate to the board of supervisors and the collection of taxes and the revenue.

Articles ten to twelve relate to license taxes, special taxes, privilege taxes, and the like.

Articles thirteen, fourteen, and fifteen prescribe certain duties for designated officers touching the collection of the revenue.

And, lastly, article fifteen provides for a State board of equalization to equalize the assessments returned to them from each county.

At the risk of proving tedious, I have thus briefly outlined the salient provisions of the Revenue Act of Kentucky, with a view to have the Court regard it as a whole, and in construing it with reference to the Constitution of Kentucky and of the United States to take it "from its four corners." It is obvious that the provisions of sections 4077, 4078, 4079, 4080, and 4081 must be construed, not only by the express terms in which they are enacted, but also as they relate to other provisions of the same act. The environment of these sections is an important factor in determining their constitutional soundness.

And now, leaving out of view for the moment the method by which "all property" in the Commonwealth for purposes of taxation is ascertained and taxed by this act, it must be conceded that there is no discrimination in the act

in favor of any class of property against any other class of property, saving, of course, the property exempted by the act and the constitution. Whether the property be that of a natural or artificial person, that of a white man or a black man, that of a resident or non-resident, that of a citizen or an alien, this act, like the *pallida mors* of Horace, *æquo pulsat pede pauperum tabernas regum que turres.* Whether it be one class or another, this act with searching persistency seeks, in the language of sections 172 and 174, to reach and tax "*all property.*"

The provision of section 172 that "all property * * * "shall be assessed for taxation at its fair cash value, esti- "mated at the price it would bring at a fair voluntary sale," and the provision of section 174 that "all property, whether owned "by natural persons or corporations, shall be taxed in propor- "tion to its value, * * * and all corporate property "shall pay the same rate of taxation paid by individual "property," I take it, is a constitutional declaration that taxation, in the language of the Kentucky Court of Appeals, "must be equal and uniform."

And now, having advanced thus far, I am ready to stand the Adams Express Company and the Henderson Bridge Company up together alongside a citizen of Kentucky—a natural person—and measure the taxation applied to each under the Revenue Act, to see if there is discrimination against these complaining children—one born in lawful wedlock and the other a sister's child.

And just here I must stop for a moment to answer the suggestion that the act discriminates as between certain corporations in Kentucky.

No better answer can be given than that contained in the

opinion of Judge Barr sustaining the demurrer to the bill as amended. He says:

"The bill as amended does not change the question decided on the original bill; but, as the amendment alleges that there is a large amount of monied capital in the State employed in mining, manufacturing, commercial, and industrial pursuits by corporations whose intangible property, at least in part, is not taxed under the Kentucky statutes, it is proper that we should indicate our construction of those statutes. The language of section 4077 is: 'Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and also every other like company, corporation, or association, and every other corporation, company, or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised.'

"We think the words in this section, 'also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service,' must include all corporations, and cannot be confined to those corporations which are of a like character as those specially named. If this be not so, the words 'also every other corporation, company, or association' in this section are meaningless, as the preceding words, 'every other like

company, corporation, or association,' had theretofore been expressly included. If this construction be the correct one, then there is no discrimination between monied capital employed by corporations in mining, manufacturing, commercial, and other industrial pursuits and that employed in railroads, telegraph companies, express companies, and other like companies, but the intangible property of all corporations is taxed, and taxed at the same rate. It is true that the provisions of sections 4077 and 4078 do not apply to all individual tax-payers, but a reference to 4020 of the Kentucky statutes and the schedule which must be returned by each tax-payer, provided by section 4058, indicates, we think, that there is no intention on the part of the State to exempt individual tax-payers from a tax upon any of their intangible property, whatever that may be. In the description of property tax in the schedule the first eleven articles required to be returned by the tax-payers generally are of intangible property, and under the head of miscellany the value of all property not mentioned specially is required to be returned. It is true that the mode of the assessment of intangible property of corporations, companies, and associations mentioned in section 4077, and that of individual tax-payers is different under the statutes, and it is perhaps true that the intangible property of these corporations and associations may be in some respects different from intangible property which belongs to individual tax-payers and which is taxed; but I see nothing in the statutes which exempts any intangible property owned by any corporation or any individual tax-payer which is taxed when owned by any other corporation or individual. Although, as indicated in the original opinion, we do not think that a tax levied upon intangible property is strictly a franchise tax, though called so in the statute, but a property tax, yet it is quite clear that the value of the franchise is intended to be estimated as intangible property. The 172d section of the constitution declares, 'All property not exempt from taxation by this con-

stitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair and voluntary sale.' Thus a fair cash value and the mode of estimating such valuation is fixed by the constitution itself; but this constitutional rule of valuation of property for an ad valorem tax does not prevent the legislature from prescribing the mode or method of ascertaining the different kinds or quantities of taxable property belonging to the several tax-payers, whether they be natural or artificial persons. Nor does it prescribe how or by whom the assessment for taxation shall be made, except as to the valuation. All else as to the mode of assessment, we think, is left within the discretion of the law-making power. Thus an assessment may be made by one assessor or by a board of assessment and valuation, and may be made in any manner that is just and equitable.

"Neither does this section or any other provision of the constitution confine the levy of an ad valorem tax to tangible property; but, as decided by the Kentucky court of appeals in Levi against The City of Louisville, 16th Kentucky Law Reporter, page 872, it does require the levy of an ad valorem tax upon personal property as well as real estate, and this case decides that a license tax which is not a property tax cannot be substituted for an ad valorem tax upon personal property engaged in certain commercial pursuits in the city of Louisville. It does not decide that section 171 of the constitution, which declares that taxation shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, applies to taxation based upon income, license, of franchise. If there is any intimation upon the subject in this case, it is that taxation which is based upon income, license, or franchise may be classified by the legislature; and as to licenses, they may be levied upon some employments and occupations and not upon others. If, however, we are correct in our construction of the Kentucky statutes, there is no ground for contending that there is a want of uniformity in the

levy of the taxes against the defendant, even though section 171, requiring uniformity of taxation upon all property subject to taxation, apply to taxation based upon income, license, or franchise, and is given its broadest possible construction.

"If we are correct in our view, it is not necessary for us to consider whether the Kentucky constitution (sec. 171–174) requires a taxation upon all property, tangible or intangible, within the territorial limits of the authority levying the tax and at a uniform rate or only requires a uniform rate of taxation upon a class of property made subject by law to taxation within the taxable limits, nor is it necessary to consider whether if the rule of universality and uniformity applies to an ad valorem tax it also applies to taxes based upon income, license, and franchise."

The only case cited in opposition to the views here expressed by Judge Barr is that of Levi *vs.* City of Louisville, 16 Ky. Law Reporter, 872, noticed by him in his opinion. That case is valuable in this connection, not only as a complete refutation of the claim made by appellants, but as illustrating the view of the revenue statute entertained by the Kentucky Court of Appeals. In the course of the opinion Chief Justice Pryor, speaking for the court, says:

"Under the former State constitution the right to impose one rate of taxation on one class of property and a different rate on another class was well understood, but in considering the provisions of the present constitution we find the mode of assessment prescribed by that instrument requiring in plain terms that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. It would do violence not only to the intention of the framers of this instrument, but its letter and spirit, to hold that the system adopted by its

provisions could be disregarded and another selected, better suited to the business of the municipality and more just and uniform in its terms; nor do we find in the constitution a provision of any kind conferring on a municipal government the power to assess property for the purposes of revenue by imposing a license tax; nor has the legislature the power to authorize the imposition of a tax on the amount of property, whether real or personal, in any other mode than that provided in the organic law. The power of the legislature to tax a franchise is expressly conferred, and for that reason the mode of determining its value is pointed out by that body; and, after creating a board of valuation to value every and all corporations, associations, or companies having or exercising any exclusive privilege or franchise not allowed by law to natural persons, the power of this board is confined to the invisible estate of the corporation, and its real and tangible property, such as can be seen and valued by the assessor, is required to be omitted, or rather deducted, from the value of the franchise as found by the board, because this species of property is required to be assessed in the county or place where located or its franchise exercised. The legislature was careful, when adopting a mode of valuing a franchise, to omit from its valuation the tangible property that must, under the provisions of the constitution, be assessed where located by the State, county, or municipal authorities at its fair cash value; and whether or not this mode is nearer uniformity and equality than the mode contended for is not for this court to determine; nor can these provisions, so plain and unmistakable in their purpose, be made the subject of judicial consideration. It must be conceded that, if the mode of valuing a franchise had been fixed by the constitution as is found in the statute, no power would exist with the legislature to adopt any other mode."

And in the case of The Henderson Bridge Company against The Commonwealth the Kentucky court, speaking through the lamented Judge Grace, says, *inter alia:*

"Thus we see what a varied meaning this term 'capital stock' may have, so that it becomes necessary to examine and see what was the object and meaning of the legislature when using this term in the clause before quoted from section 4079 of our statutes. In this examination it becomes important to notice those clauses of the constitution in reference to revenue and taxation and see what was contemplated and enjoined by that instrument in reference to taxation. Section 172 provides: 'That all property not exempt from taxation by this constitution shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.' * * * Section 174 provides: 'That all property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses, or franchises.'

"Thus it is manifest that what the constitution intended to be taxed was property—all property—and as to corporations, not only all tangible property, but that it intended to leave the legislature of the State free to tax the franchise of corporations if it so desired; that the property of a corporation should be taxed as the property of an individual. It will be observed that in these several sections quoted 'capital stock,' 'stock,' and 'shares of stock' are not mentioned as being appropriate terms to designate the subjects of taxation, but it says 'property,' 'all property,' etc., so that there might be no confusion as to what that instrument intended; neither is there any reason to suspect that the legislature did not understand the language and meaning of

the constitution when it came to frame the revenue laws of the State under it now under consideration; neither is there reason to suspect that it did not intend and endeavor in good faith to carry into effect the intent and meaning of the constitution, so that we may safely interpret all words and phrases (of doubtful and uncertain meaning) in accordance with and so as to effectuate and carry out that intent."

Now, if we take the report of the Adams Express Company made to the auditor of public accounts of its property in Kentucky, found as an appendix to this brief, and the finding of the board of valuation and assessment thereon, and in the case of the Henderson Bridge Company, we will have a standard of comparison by which to estimate the operation of sections 4077, 4078, and following, upon a domestic corporation of Kentucky, a foreign corporation, and a natural person, a citizen of Kentucky.

The Adams Express Company says it operates 25,000 miles of line or service in the United States, of which 2,198 are in Kentucky. This, according to the method adopted by the legislature of Kentucky in the statute under consideration, would value the property of the Adams Express Company in Kentucky at $1,605,416.74, upon which the tax would be $6,823.02.

In the case of the Henderson Bridge Company the capital stock for the purpose of taxation was fixed at $1,514,893, its tangible property at $649,735.54, which being deducted from the capital stock leaves $865,157.46, the value fixed for the intangible property or its franchise, as it is called in the statute, and upon this the tax is $3,675.91. Exactly how this conclusion is reached is shown concretely by the examination of the auditor as a witness in the Franklin circuit

court, the whole of which is found on pages 12 to 18 of the Record in No. 462 of this Court. I extract this answer of the auditor to a question by the court.

"The WITNESS: They say in their report that they have $1,000,000 of common stock, but do not therein give any sales; say they do not know the real value of the stock or the highest price at which sold in the twelve months before. They say that the par value of the stock is $1,000,000; then they report a surplus of $411,655.47 and other assets, $3,116,361.73, making a total of a little over $3,528,000 of such assets. They say their gross earnings or income amounted to $209,072.21; income from all other sources, $8,000; total, $217,072.21; less interest on bonds, $120,000; less sinking fund, $21,000; net profit, $76,072.21; so that you see here the corporation paying $120,000 interest on $2,000,000 of bonds, putting $21,000 into a sinking fund, and with a net profit upon the operation of the bridge of $76,072.21, which was over 7 per cent. on $1,000,000 of stock. They said their tangible property was $649,735.54, and that is the amount they are assessed at in Henderson county. When we undertook to make the figures they had in the meantime filed this affidavit of Mr. Green that the stock was only worth 90 cents on the market, and yet their profits were $76,072.21, with $21,000 in the sinking fund after paying interest on the bonds. I think our first intention was to tax them on the basis of $3,000,000, but after we got that affidavit and other affidavits that related largely to this surplus fund of $411,000 and other assets of $3,116,000, that these were simply the face of their records, we agreed to just regard their capital stock as being worth $900,000 and their bonds as worth $2,000,000. Adding the two together, we have the total of $2,900,000 as the value of their whole property as fixed. We settled upon that sum as the whole value of the Henderson Bridge Company. From that we took, first, the amount of the assessment on 9.46

miles of railroad in Indiana at $66,000 per mile, with $3,250 for .65 of a mile of siding at $5,000 a mile and $50 for improvements on right of way. We took that from the $2,900,000. Then we deducted for so much of the bridge as was in the State of Indiana. We took that from the report of Mr. Montfort, the chief engineer. The statement made by the president says: '1,230 feet of the bridge is in the State of Indiana, and it is connected with the Southeast and St. Louis railway by a connecting railroad 9.46 miles in length.' We got the number of feet in Kentucky, but I do not see the paper which gave it. I think the proportion was almost exactly two-thirds in Kentucky and one-third in Indiana; so after deducting the $627,660 which was taxed in Indiana we took two-thirds of the remainder as liable for taxation in Kentucky and from that took the assessment of tangible property in Henderson county, the remainder being franchise value of $865,157.46."

The citizen of Kentucky, having the qualifications of an elector, upon $1,605,416.74, would pay, as the Adams Express Company pays, a tax of $6,823.02. His gross income from it, if he were ordinarily fortunate, would be $80,270.83. The Adams Express Company is not candid or ingenuous enough to tell the Commonwealth of Kentucky what the annual income from her 2,198 miles of line operated in sixty-eight counties of that State is. But estimating it relatively from similar concerns engaged in the same business, the receipts from her Kentucky offices per annum ought to be, and doubtless are, over $200,000.

The citizen of Kentucky, having the qualifications of an elector, with property valued at $1,514,893, as in the case of the Henderson Bridge Company, would pay a tax, as the Henderson Bridge Company does, of $6,437.99, $3,675.91 of

which the bridge company pays upon her intangible property and $2,762.08 on her tangible property. On this capital the citizen of Kentucky, if ordinarily fortunate, would have a gross income of $75,744.65. The Henderson Bridge Company, on this same valuation, has an annual income reported by it of $217,072.21.

The citizen of Kentucky is a home-builder, can have wife and children, produce men and women, serve on juries, work roads, make laws, bear arms in defense of the Commonwealth, fulfill the whole round of civic duties, and, if need be, give his life that the old Commonwealth may live.

None of these duties, so important to the State, can the Adams Express Company or the Henderson Bridge Company by any possibility render.

And yet, as I have demonstrated, the burdens of taxation in Kentucky fall upon these three *measured by property alone*—one a Kentucky corporation, the other a New York creation, and the third a citizen of Kentucky—like the dew of heaven, on all alike.

The fact that a different mode of assessment is used to find the value of one class of property, or even a different rate of taxation, subjecting one class of property to one rate and another class to another rate, is entirely immaterial.

Home Ins. Co. *vs.* New York, 119 U. S., 129.

The power to tax and the power of apportionment and classification of subjects are identical and inseparable, and the legislative determination as to the just proportion to be

borne by the public and classification of subjects to be taxed is conclusive.

Lexington *vs.* McQuillan's Heirs, 9 Dana, 513.

Providence Bank *vs.* Billings, 4 Pet., 563.

Salem Turnpike *vs.* Essex Co., 100 Mass., 282.

Desty on Taxation, vol. 1, sec. 26, and authorities cited.

II.

If the revenue statute of Kentucky operates equally and uniformly upon all property of the same class, it cannot be repugnant to the last clause of the fourteenth amendment of the Federal Constitution, forbidding any State to "deny to any person within its jurisdiction the equal protection of the laws."

The provisions of this amendment do not add anything to the fundamental rights of citizens. That duty was originally assumed by the States and remains there. The amendment simply confers on the United States the power and duty to see that the States do not deny the right, and the power of the General Government is limited to the enforcement of this guaranty.

United States *vs.* Cruikshank, 92 U. S., 542.

Nor is the restriction violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and circumstances to resort to them for redress.

Missouri *vs.* Lewis, 101 U. S., 22.

Kentucky Railroad Tax Cases, 115 U. S., 321.

An assessment of a three-mill tax on the face value of corporate securities instead of on their actual value is not a discrimination which the State cannot make when all corporate securities are subject to the same rule. This amendment does not prevent a State from adjusting its system of taxation in all proper and reasonable ways nor compel it to adopt an iron rule of equal taxation. The amendment intended only that equal protection and security should be given to all under like circumstances, and that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.

Bull's Gap R. R. *vs.* Pennsylvania, 134 U. S., 232.
Chester *vs.* Pennsylvania, 134 U. S., 240.

See also:

Hayes *vs.* Missouri, 120 U. S., 68.
Chicago Life Ins. Co. *vs.* Needles, 113 U. S., 574.
Mo. Pac. R. R. Co. *vs.* Humes, 115 U. S., 512.
Dow *vs.* Beedelman, 125 U. S., 680.

It follows, therefore, that if I am correct in my conclusions, stated under the first head of this brief, it is impossible to make the provisions of the revenue statute of Kentucky repugnant to the last clause of the fourteenth amendment of the Federal Constitution.

III.

The tax against the companies here complaining is a tax on account of property owned and used by them in Kentucky, and as to the express company the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. Such taxation is not repugnant to the commerce clause of the Constitution.

If I have read aright the decisions of this Court upon this question, the proposition laid down in italics is but a restatement of the doctrine, over and over again, expounded by this Court.

The latest and most comprehensive expression of this doctrine, reviewing as it does the former decisions upon this and cognate questions, is that expressed by the Chief Justice in Postal Telegraph Company *vs.* Adams, 155 U. S., 689. The summary of the law upon this question, as held by this Court, is thus clearly and tersely stated by Chief Justice Fuller:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce or on the receipts derived therefrom or on the occupation or business of carrying it on a tax is levied by a State on interstate commerce such taxation amounts to a regulation of such commerce and cannot be sustained; but property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce may be taxed, or a tax may be imposed on the corporation on account of its property within a State and may take the form of a tax for

the privilege of exercising its franchises within the State if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

"As pointed out by Mr. Justice Field in Horn Silver Mining Company *vs.* New York, 143 U. S., 305, the right of a State to tax the franchise or privilege of being a corporation as personal property has been repeatedly recognized by this Court, and this whether the corporation be a domestic or a foreign corporation doing business by its permission within the State; but a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce or a corporation in the employment of the General Government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the State may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. (Ashley *vs.* Ryan, 153 U. S., 436, and cases cited.)"

And again:

"And in the case at bar the Supreme Court, in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company in lieu of all others as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, State,

county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.' This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. *The substance and not the shadow determines the validity of the exercise of the power.*"

In the case of The Western Union Telegraph Company *vs.* Massachusetts, 125 U. S., 530, Mr. Justice Miller, referring to the limitation of the power of taxation by the States, cites Texas *vs.* The Telegraph Company, 105 U. S., 460; Railroad Co. *vs.* Penniston, 18 Wall., 5; Thompson *vs.* Pacific Railroad Company, 9 Wall., 579; Nat. Bank *vs.* Commonwealth, 9 Wall., 353, but concludes as follows:

"That limitation is that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that Government."

Referring to the tax in that case, which is entirely on all fours with the tax in this case, Mr. Justice Miller says:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length

throughout the whole country is made the basis for ascertaining the value of that property."

In The Pullman Car Company *vs.* Pennsylvania, 141 U. S., 18, Mr. Justice Gray gives a very full discussion of the question of domicile as affecting the situs of personal property for purposes of taxation. The language of the Court in that case is equally applicable in this case:

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not on or because of the transportation or the right of transit of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the State is, in substance and effect, a tax upon that property."

See also:

Ratterman *vs.* Western Union Telegraph Co., 127 U. S., 411.
Maine *vs.* Grand Trunk Railway, 142 U. S. 217.
Cleveland, Cin., &c., R'w'y *vs.* Backus, 154 U. S., 439.
Leloup *vs.* Mobile, 127 U. S., 640.
West. Union Tel. Co. *vs.* Poe, 61 Fed. Rep., 469.
Sanford *vs.* Poe, 69 Fed. Rep., 546.
Opinion of Judge Barr, Record, p. 18.

The cases cited by counsel for the appellant and plaintiff in error do not, when properly understood and read in connection with the matter in hand in each particular case, militate against the view here presented upon the authorities of the cases cited.

In the case of The Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., 196, the Court, while deciding against the validity of the tax there sought to be enforced, is very careful to say:

"Freedom from such impositions does not, of course, imply exemptions from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, *or from the ordinary taxation to which other property is subjected*, any more than like freedom of transportation on land implies such exemption."

The case of Crutcher *vs.* Kentucky, 141 U. S., 47, was where *a license* for doing business was attempted to be enforced against the express company. No question of an *ad valorem* tax against the property of the express company was raised, suggested, or mentioned in the opinion.

So also as to State tax on foreign-held bonds, 15 Wall., 300; Railroad Company *vs.* Jackson, 7 Wall., 262; St. Louis *vs.* Ferry Co., 11 Wall., 423, and other cases cited. In the first-named case Mr. Justice Harlan decides that the power of the State in respect to the power of taxation of property is confined to such property as is within its jurisdiction; but this does not touch the question of whether the scheme here devised by the legislature of Kentucky to determine *what property appellee has in Kentucky* is or is not repugnant to the Constitution of the United States. It certainly is not inconsistent with the doctrine of the telegraph cases herein relied on.

I do not desire to make any question upon this record as to the remedy by injunction or as to the parties complainant in the express cases. These points might be available in a desperate case, where I wished to avoid a decision upon the vital and

important question involved. In this case I invoke the decision of this Court upon the constitutionality of this Kentucky statute, seeking to equalize the burdens of taxation.

In conclusion, I may be permitted to say that the decisions of this Court in the telegraph cases are careful statements of the best thought of the profoundest political philosophy. The States of this American Union are not Roman or British provinces to be farmed and plundered by any man under the guise of exemption from taxation—an exemption which, if granted to any agency of *private gain* for a generation, would insure the possession of inconceivable wealth and power.

An affirmance in each case is respectfully asked.

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W. J. Taylor
Atty Genl of Ky
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APPENDIX.

REVENUE AND TAXATION.

CHAPTER 103.

AN ACT relating to Revenue and Taxation.

ARTICLE I. General provisions, concerning.
ARTICLE II. Assessment of property by assessors, and their duties.
ARTICLE III. Assessment of certain corporations.
ARTICLE IV. Assessment of and payment of taxes by railroads.
ARTICLE V. Assessment of distilled spirits.
ARTICLE VI. Board of Supervisors.
ARTICLE VII. Collection of revenue.
ARTICLE VIII. Collection of taxes and other public money by action.
ARTICLE IX. Collection of taxes by attachment.
ARTICLE X. License tax.
ARTICLE XI. Tax on organization of certain corporations, and license tax of certain foreign corporations.
ARTICLE XII. Tax on law process.
ARTICLE XIII. Duties of clerks and other officers in relation to the revenue.
ARTICLE XIV. Report of officers.
ARTICLE XV. Revenue Agent.
ARTICLE XVI.

Article I.

General Provisions.

Tax rate.

§ 4019. An annual tax of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the Sinking Fund; twenty-two (22) cents for the support of the common schools, and one-half of one cent for the Agricultural and Mechanical College, as now provided by law, by an act, entitled "An act for the benefit of the Agricultural and Mechanical College," approved April twenty-ninth, one thousand eight hundred and eighty, including the necessary traveling expenses of all pupils of the State entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

Property subject to taxation.

§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

Lien for all taxes due.

§ 4021. The Commonwealth, and each county, incorporated city, town and taxing district, shall have a lien on the property assessed, and on all other property of each person or corporation owing the same, for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise,

sale or alienation shall have been made more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale.

Taxation defined.

§ 4022. For the purposes of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible.

Who liable for taxation.

§ 4023. The holder of the legal title and the holder of the equitable title, and the claimant or bailee in possession of the property, on the fifteenth of September of the year the assessment is made, shall be liable for the taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment.

Real and personal estate shall be assessed for taxation and tax paid by owner.

§ 4024. All estate, real and personal, and all interest in such estate, named and specified in the tax-book, shall be assessed for taxation, and the tax paid by the owner thereof to the persons authorized by law to receive the same, unless otherwise specially provided.

Lands to be valued and listed where located.

§ 4025. Lands shall be valued for taxation without reference to conflicting title, and shall be listed in the county in which it is located.

Property exempt from taxation.

§ 4026. The following property is exempt from taxation: Public property used for public purposes; places actually used for religious worship, with the grounds attached thereto, and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit; institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as

a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities, and two acres of ground in the country, appurtenant thereto; household goods and other personal property of a person with a family not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made and in the hands of the producer.

Bond to bind all officers and sureties.

§ 4027. The bond of all officers mentioned in this chapter shall bind them and their sureties to not only the faithful performance of their duties, and the strict accounting of all moneys due by them to the State, but also for the correctness of all amounts claimed and collected by them as commissions or compensation for their services.

Penalty enforced by indictment or action.

§ 4028. Whenever any penalty is provided for in this chapter, it may, unless otherwise specially stated, be enforced either by indictment in the circuit court of the county, or by action in any court having competent jurisdiction.

Penalty.

§ 4029. When no other penalty is mentioned for a failure to do an act, or the doing of an act forbidden or required by this chapter, the penalty in all such cases shall not be less than ten nor more than five hundred dollars.

Deeds executed by sheriff *prima facie* evidence.

§ 4030. In all suits and controversies involving the titles of lands claimed or held under a deed executed by a sheriff in pursuance of a sale for taxes, the deed shall be *prima facie* evidence of the regularity of the sale and of all prior proceedings and title in the person to whom the deed has been executed.

If purchaser die before deed executed duty of sheriff.

§ 4031. If the purchaser of land sold for taxes shall die before a deed thereto shall be executed, the deed may be executed by the sheriff to and in the name of the deceased person, and such deed shall vest the title in the heirs-at-law or devisees of such deceased person, in the same manner as though made to the decedent before his death, and be liable to claims of creditors and other persons as if the deed had been executed to the deceased person while living.

Lienholders may pay taxes of delinquent—when.

§ 4032. Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lienholder may pay the taxes, interest and

penalties thereon, and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lienholder.

Occupant or tenant who pay taxes entitled to recover.

§ 4033. Whenever the occupant or tenant of any land, or bailee or person in possession of personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid, and interest, which shall constitute a lien on the property upon which such tax was paid.

Where two or more persons own land, how tax apportioned.

§ 4034. Where two or more persons own land which has been assessed as one tract, any one or more of them, after partition of the same, and upon ten days' notice to the other owners, may make application to the county court of said county for an apportionment of the assessment; and the said court is hereby authorized to apportion the assessment among the owners according to the value of their respective interests, as shown by the proof introduced by them. If delinquent taxes are due on said land, any one or more of said owners may have his portion released therefrom by paying to the officers to whom such delinquent taxes are payable his *pro rata* share thereof, as ascertained by the judgment of apportionment, and said judgment shall be final, unless an appeal therefrom to the circuit court, which is hereby given appellate jurisdiction, be prosecuted within sixty days from the rendition of the same.

Land owned jointly—how tax paid.

§ 4035. Where land owned by two or more persons shall be assessed conjointly, and any one or more of them shall not pay their portion of the tax, any such owner paying the whole tax, or who shall redeem the whole tract after it has been sold for delinquent taxes, shall have a lien on the delinquent's portion for the tax justly owing by such delinquent, and may sue for and recover the same.

Purchasers of land sold for delinquent taxes may have lien—how.

§ 4036. Whenever any person shall purchase property sold for delinquent taxes, and the sale shall be set aside because of any irregularity, the purchaser shall have a lien on the property for the amount of taxes and cost paid by him, and

for which the property is liable, with legal interest from the time of such payment, which may be recovered from the owner of the property or person owning the same.

Penalty against officer retaining compensation of deputies.

§ 4037. No officer named in this chapter shall retain any part of the compensation allowed his deputy or deputies longer than thirty days. Any officer violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than five hundred dollars for each offense.

Auditor to relinquish for 1879 and prior thereto.

§ 4038. That in all cases where lands have been purchased by the State for taxes which were assessed in one thousand eight hundred and seventy-nine, and prior thereto, the State as to said taxes hereby relinquishes all claim, and the Auditor is hereby directed to relinquish upon the record-books of his office all such lands.

Descriptive list of mineral, oil lands and timber to be filed—assessment.

4039. That it shall be the duty of all persons owning any lands, mineral rights, or standing (branched) trees of any kind whatever, or the lands of another, or any coal, oil or gas privileges, by lease or otherwise, or any interest therein, in any counties in this Commonwealth other than the county in which they reside, or if they reside out of the State, to file a descriptive list with the clerk of the county court of the county in which said property is situated, under oath showing the number of any such branded trees, giving the kind of each, and upon whose land or lands the same is situated, also the number of acres of lands, mineral rights, coal, oil or gas rights, and the actual location by metes and bounds, courses and distances of each tract, giving the nearest resident to each, on or before the fifteenth day of August one thousand eight hundred and ninety-four, from which descriptive list or lists the assessor of the county in which same is filed will list the same for taxes each year at its fair cash value; and any person failing to comply with the requirements of this act shall be fined for each of such failures one hundred dollars and costs.

Sale of for taxes—penalty.

4040. It shall be the duty of the sheriff or tax collector, if any of the property herein referred to shall be sold by him for such taxes, to be governed in the advertisement

and sale of the same, under the laws now in force in this Commonwealth regulating sales of lands under execution; and if said sheriff or tax collector shall at the time of such sale, have both State and county taxes against said property, and fails to get a bidder to cover said taxes and costs, he shall strike the same off, one-half to the State and the other half to the county, in payment of said taxes, and certify the same to the clerk of the county court of said county, and also to the Auditor of this State; and if said sheriff or tax collector shall fail herein, he shall be fined twenty dollars.

Redemption right.

4041. That any lands or other property sold for taxes under the provisions of this act may be redeemed by the owner thereof, as is now provided by law for the redemption of such property when sold for taxes.

Construction of act.

4042. This act shall be construed to mean that all tracts or parts of lands shall be listed in the counties in which they may be situated.

Article II.

Assessment of Property by Assessors, and their Duties.

Assessor—penalty for failing to accept.

§ 4043. Any person elected or appointed assessor of taxes at his request, who shall willfully fail to accept the office and discharge the duties thereof, shall be fined five hundred dollars. The assessor may appoint, with the approval of the county court, as many sober, discreet, capable persons, not under the age of twenty-four years, as deputies, to assist him in the discharge of his duties, as he may deem necessary, and may remove them at his pleasure. The assessor and his assistants are authorized to administer the oath required to be taken by persons whose property is required to be listed for taxation.

Assessor—oath of.

§ 4044. The assessor and his deputies, before they enter upon the duties of the office, shall, in addition to the oath prescribed by the Constitution, take the following oath: "I do swear that I will administer to every person listing

property of any description the oath prescribed by law, and fix the value of all property to be listed by me at its fair cash value, estimated at the price it would bring at a fair voluntary sale without favor or partiality; that I will diligently search and inquire so that no person shall be passed over, or shall fail to have an opportunity to give a list of his taxable property, and that I will truly report all persons who shall fail or refuse to list their taxable property, after being duly called on by me for that purpose, or who have given in a false or fraudulent list, so help me God."

Assessor—bond of.

§ 4045. The assessor shall at the same time execute bond to the Commonwealth, with good surety, to be approved by the county court, for the faithful discharge of the duties of his office, which bond shall be filed in the office of, and kept safely by, the clerk of the county court, and on which the assessor and his sureties shall be liable for any violation of the duties of his office, by himself or any of his assistants. Actions may be instituted on it by the Commonwealth or any person aggrieved, and recovery had thereon, from time to time, to the extent of the injury sustained.

When to commence duties.

§ 4046. The assessor shall commence the duties of his office on the fifteenth day of September in each year, and he shall assess his county by justices' districts, in separate books, and he shall also make a separate book or books for each incorporated city, town or taxing district (except school districts), of his county, by wards or other subdivisions, as convenience may require.

Oath to taxpayer.

§ 4047. The assessor or his deputies shall administer to every person listing property the following oath: "You do swear that the list of taxable property about to be given in by you will contain a full and complete list, and the best description you can give, of all and every species of property belonging to you or in your possession subject to taxation on the fifteenth day of September last, and that, according to your best judgment, you will value your property at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and that you will true and perfect answers make to all such questions as may be asked

you concerning your taxable property, or that of others in your possession, or about to be listed by you for them." If, in the opinion of the assessor or assistant, there be any error in any list, it shall be his duty to note same on his tax-book, so as to call the attention of the board of supervisors thereto.

Duties of assessor as to descriptive lists of non-residents' lands.

§ 4048. The assessor shall call upon the county clerk from time to time, for description lists of lands owned by non-residents, and make use of the information contained in them in making out his lists and books of taxable property.

Real estate—where listed.

§ 4049. Real estate, or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein. If the owner fails to list the same, the assessor shall, nevertheless, list all lands in his county; and to enable him to ascertain the person in whose name to make the list, he is empowered to swear witnesses, and their statements must be put in writing and returned with the tax-book, and a note or reference made to the proof in the listing of the land.

Personal property to be stated separately.

§ 4050. Personal property of every kind shall be separately stated and valued in the appropriate column of the tax-book herein provided, and if there be no appropriate column, it shall be valued and stated in the column headed "miscellany."

False statement for purpose of avoiding taxation—how punished.

§ 4051. If any person shall willfully make a false statement, or, for the purpose of avoiding taxation, make a temporary investment in securities exempt by law from taxation, or convert any intangible personal property into non-taxable property, or make such investment with such intent in land or other property, outside of this State, or resort to any device whatever for the purpose of avoiding taxation, he shall be deemed guilty of a misdemeanor, and, on conviction, fined any sum not exceeding five hundred dollars, and be subject to the payment of three times the amount of the tax upon his estate, to be recovered by the sheriff by action in the name of the Commonwealth in the county in which the estate is liable for taxation; or by the

Auditor, when the taxes are payable to him, in the Franklin circuit or quarterly court.

Estate shall be valued and assessed—when.

§ 4052. All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that date shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

Assessor to fix value—how.

§ 4053. The assessor, from his own knowledge, and from the statement of the person listing the property for taxation, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, shall fix the value upon all the estate listed with him for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and enter the same in his tax-book, in the proper name and title of things, together with the Christian and surname of the person, and other information designated in the form of the tax-book prescribed by law, giving, also, the aggregate value of the property assessed, and, in estimating the value of lands, the increased value, on account of all improvements thereon, shall be taken into consideration. If the value fixed by the assessor be greater than that fixed by the tax-payer, it shall be the duty of the assessor to notify the tax-payer, at the time of the assessment, the amount of such increase, and of the time and place of the meeting of the board of supervisors. The assessor shall report to the board of supervisors a list of all tax-payers in the county whose tax-lists have been added to or increased by him after receiving them from the hands of the tax-payer, together with a short statement.

Assessor to make out tax-books—how.

§ 4054. The assessor shall make out his tax-books in a fair, legible handwriting, in alphabetical order, according to justices' districts and incorporated cities, towns and taxing districts therein, and make additions of each column, so as to show the aggregate amount, value and number of each column in said tax-book, and prove the accuracy before he returns the same.

No. of qualified voters.

§ 4055. The assessor shall make and return with his tax-book the number of qualified voters resident in his county,

and when a city or town within his county shall have a separate representative in either House of the General Assembly, he shall make a separate report of the qualified voters in such city or town.

Tracts, acres, improvements valued separately.

§ 4056. Persons listing their estates with the assessor shall state separately the tracts of land, the number of acres in each tract, and the improvements thereon, the name of the nearest resident thereto, the value of each tract separately, and where situated, giving election precinct in which it is situated; the number of each town lot and the improvements thereon, in what city or town, on which street, and the value of each, and the value of the improvements thereon to the extent that the same enhances the value of each lot, and whether there is any land adjoining his owned by any non-resident of the county or State, and give the name and place of residence of such owner, if known; the number of thoroughbred stallions, geldings, mares and colts and their value; the number of stallions, mares, geldings and colts of common or mixed stock, and their value, and the number of mules, jacks, jennets and mule colts and their value; the number of thoroughbred bulls, cows, calves and their value; the number of bulls, steers, cows and calves of common or mixed stock, and their value; also all other estate owned by them and subject to taxation, with the value thereof on the fifteenth day of September of the year for which the list is given, and such other facts as may be required in the blanks as hereinafter provided. But no error or informality in the description or location of the property, or in the name of the owner or party assessed, shall invalidate the assessment if the property can with reasonable certainty be located from the description given; and in case of such error and informality, the collector may receive the taxes and by his receipt correct such error or informality.

Pawners and pledgers — duties as to.

§ 4057. Every person or company engaged in the business of receiving property in pledge or security for money or other thing advanced to pawners or pledgers shall return, under oath, the fair cash value of all property so pledged and held on the fifteenth day of September annually, and taxes

shall be charged on the value of such property to the person holding the same as other property owned by him; and such person shall have a lien on the property to secure the amount of tax paid.

Auditor to furnish blanks —when.

§ 4058. Before the first day of September of each year the Auditor of Public Accounts shall deliver to each county clerk of this State, for the use of the assessors and their assistants, a sufficient number of assessment books and necessary blank schedules for the assessment of all property, real and personal, with interrogations to be propounded to each person, with affidavit thereto attached, to be signed and sworn to by the party whose property is assessed. The schedules shall contain two columns. In one, the person whose property is assessed shall fix the values. In the other, the assessor will fix what, in his judgment, is the proper valuation of the property. The party, or the assessor, where the party can not write, shall write the word "None" after each item whenever he has no property to assess as named in such item; but no item shall be passed without being answered. The following shall be the form of interrogatories and schedule as hereinbefore required:

Interrogatories propounded to, and answered by —— ——, of —— county, —— State of Kentucky, on the — day of ——, and schedule of all property held or owned by him on the fifteenth day of September, eighteen ——, and valuations thereof as fixed by him and as fixed by the assessor.

INTERROGATORIES.

Interrogatories.

No. 1. Are you, or were you, on the fifteenth day of September of the present year, executor of the will or administrator or curator of the estate of any deceased person, or guardian, committee, assignee, commissioner, receiver or trustee of any person, or have you in your possession, or under your control, any property, money or other thing

of value belonging to any other person or corporation? Answer. ——. If the answer is Yes, the person is required to list such property separate from his own, and in the name of the real owner, and show by whom listed.

No. 2. Have you, before the fifteenth day of September of the present year, either personally or through the agency of another, caused any part of your taxable money or other property to be temporarily converted, either by sale, exchange, or any other manner, into any bonds, money or securities not taxable, or any other property not taxable under the laws of this State, for the purpose of evading the payment of taxes, or have you resorted to any means or device whatever to evade the payment of taxes on any part of the property owned by you during twelve months next preceding the fifteenth day of September of the present year? Answer. ——. If the answer is Yes, the person will state all the facts connected with such transaction, and the assessor will reduce such statement to writing, and attach it to the schedule, and make a note of the fact in his books, that the attention of the supervisors may be called thereto.

SCHEDULE.

No. of Item.	DESCRIPTION OF PROPERTY.	Value fixed by the person assessed.	Value fixed by the Assessor.
1.	Amount of bonds	$	$
2.	Amount of notes secured by mortgage	$	$
3.	Amount of other notes	$	$
4.	Amount of accounts	$	$
5.	Amount of cash on hand	$	$
6.	Amount of cash on deposit in bank	$	$
7.	Amount of cash on deposit with other corporations	$	$
8.	Amount of cash on deposit with individuals	$	$

SCHEDULE.

No. of Item	DESCRIPTION OF PROPERTY.	Value fixed by the person assessed	Value fixed by the Assessor
9.	Amount of all other credits or money at interest	$	$
10.	Amount of stock in joint stock companies or associations	$	$
11.	Amount of stock in foreign corporations	$	$
12.	Numbers of acres of land		
13.	Nearest residence thereto		
14.	Election precinct in which situated		
15.	Valuation of each tract with improvements	$	$
16.	Number of city or town lots		
17.	Name of city or town where located		
18.	Value of each with improvements	$	$
19.	Number of thoroughbred or standard stallions		
20.	Value	$	$
21.	Number of thoroughbred or standard geldings		
22.	Value	$	$
23.	Number of thoroughbred or standard mares and colts		
24.	Value	$	$
25.	Number of stallions of common stock		
26.	Value	$	$
27.	Number of geldings, mares and colts of common stock		
28.	Value	$	$
29.	Number of mules and mule colts		
30.	Value	$	$
31.	Number of jacks		
32.	Value	$	$
33.	Number of jennets		

SCHEDULE.

No. of Item	DESCRIPTION OF PROPERTY.	Value fixed by the person assessed	Value fixed by the Assessor
34.	Value	$	$
35.	Number of thoroughbred or standard bulls		
36.	Value	$	$
37.	Number of thoroughbred and standard cows and calves		
38.	Value	$	$
39.	Number of bulls, cows, calves and steers of common stock		
40.	Value	$	$
41.	Number of sheep		
42.	Value	$	$
43.	Number of hogs		
44.	Value	$	$
45.	Value of agricultural implements	$	$
46.	Value of agricultural products	$	$
47.	Less value of the crops grown in the year the assessment was made and in the hands of the producer $	$	$
48.	Value of agricultural products for taxation	$	$
49.	Value of wagons, carriages, bicycles and vehicles of every kind	$	$
50.	Value of slaughtered animals	$	$
51.	Value of sewing and knitting machines	$	$
52.	Value of safes	$	$
53.	Value of household and kitchen furniture	$	$
54.	Value of manufacturing implements, machinery of all kinds	$	$
55.	Value of piano-forte and other musical instruments	$	$
56.	Value of raw material to be used in manufacturing	$	$
57.	Value of manufactured articles	$	$

SCHEDULE.

No. of Item ..	DESCRIPTION OF PROPERTY.	Value fixed by the person assessed.	Value fixed by the Assessor ..
58.	Number of paintings——, value thereof.....	$	$
59.	Library——, number of volumes——, value thereof.....	$	$
60.	Number of diamonds——, value thereof. ..	$	$
61.	Value of watches and clocks.....	$	$
62.	Value of jewelry....	$	$
63.	Value of gold, silver and plated ware.... ..	$	$
64.	Value of steam-engines, including boiler....	$	$
65.	Number of steam-boats, sail-boats, or other water crafts, or any interest therein——, value.....	$	$
66.	Value of mineral products.	$	$
67.	Value of coal mines, oil, gas and salt wells..	$	$
68.	Value of patent rights, and value of territory in which to sell same..	$	$
69.	Value of corporative franchise after deducting assessed value of all tangible property.	$	$
70.	Present value of annuities and royalties.....	$	$
71.	Value of brick, stone, and other building material..... ...	$	$
72.	Value of wines, whiskies, brandies, and mixtures thereof not in distillery bonded warehouse.....	$	$
73.	Number of stores——, value of stock of goods and other property therein.....	$	$
74.	Value of property held for another for the purpose of sale on commission or otherwise.....	$	$

SCHEDULE.

No. of Item ..	DESCRIPTION OF PROPERTY.	Value fixed by the person assessed.....	Value fixed by the Assessor ..
	Miscellany.		
75.	Value of all property not mentioned above..	$	$
76.	Total value of property listed as above....	$	$
77.	Less household goods and other personal property of persons with a family to be deducted from valuation of personal property listed above, not to exceed two hundred and fifty dollars in value....	$	$
78.	Balance for taxation...	$	$
79.	Males over twenty-one years of age.....		
80.	Legal voters.....		
81.	Enrolled militia.....		
82.	Children between six and twenty-one years.		
83.	Number of studs, jacks and bulls for which service fee was charged.....		
84.	Rate per season.....		

The following questions are required to be answered for statistical purposes:

SCHEDULE.

No. of Item . . | DESCRIPTION OF PROPERTY. | No. fixed by the person assessed..... | No fixed by the Assessor....

85. Pounds of tobacco raised during the year...
86. Pounds of hemp raised during the year.....
87. Tons of hay raised during the year.... ....
88. Bushels of corn raised during the year.....
89. Bushels of wheat raised during the year....
90. Bushels of oats raised during the year... ..
91. Bushels of barley raised during the year....
92. Bushels of grass seed and clover raised during the year..... ..
93. Tons of coal mined during the year.....
94. Tons of pig metal mined during the year...
95. Tons of bloom..... .....
96. Tons of bar iron.....
97. Number of acres of wheat raised during the year.... ....
98. Number of acres of corn raised during the year..... .....
99. Number of acres of meadow.....
100. Number of acres of woodland..... .....
101. Number of acres of tobacco.....

The following shall be the form of oath, which shall be printed on each schedule, which the party whose list is taken shall subscribe and swear to before the assessor or his assistant as soon as such schedule shall be completed; and all persons failing or refusing to take such oath shall be deemed guilty of refusing to give in their property for assessment, and be fined as provided for such offenses:

STATE OF KENTUCKY, }
———————————COUNTY. } *Scilicit.*

Oath. I do solemnly swear (or affirm) that the foregoing schedule contains a true, full and complete list of all taxable prop-

erty belonging to me on the fifteenth day of September, eighteen————————, and to the best of my knowledge, belief and judgment the values fixed by me to the various articles as above is the fair cash value thereof, estimated at the price they would bring at a fair voluntary sale, and that to the best of my knowledge, belief and judgment none of said articles would bring any greater sum at any such sale than as stated above. I further swear that to the best of my knowledge, belief and judgment I can not realize any greater sum on the notes and accounts owned and held by me against others than as stated by me in said schedule, and that the answers made by me to the above interrogatories are true.

————————————————

Subscribed and sworn to before me by ———————— this —— day of ————————————, after said oath was read to him by me.

————————————, *Assessor.*

Duty of assessor.

It shall be the duty of every assessor or deputy to read said oath in full to each tax-payer before he shall be allowed to sign or swear to it. Any assessor or deputy who shall violate either of these provisions shall be deemed guilty of a misdemeanor, and, on conviction, be fined fifty dollars for each offense; and any person who shall make a false statement as to any matter with reference to the listing of his property for taxation shall be deemed guilty of false swearing, and, on conviction, shall be punished accordingly.

§ 4059. The assessor shall complete his work and return the tax-books and schedules to the county clerk on or before the first day of January, and the clerk shall file and preserve the same. The schedules may be destroyed after three years.

Tax-books to be returned, and if not, duty of county clerk.

§ 4060. If, for any cause, the tax-books be not returned by the assessor, the county clerk shall copy and deliver to the sheriff the tax-books of the previous year, by the fifteenth

day of February, and take his receipt therefor, and notify the Auditor. By this tax-book the Auditor and sheriff shall be governed in the collection and payment of the tax into the Treasury for that year, and the sheriff shall be governed by the same book in collecting the county levy for that year.

Assessor to report all persons refusing to give list.

§ 4061. The assessor shall report to the county clerk the names of all persons refusing to give a full and complete list of their property, or refusing to make oath of the same, and the clerk shall notify the supervisors; and if the supervisors fail to get a full and complete list of the property of such person, and so notify the clerk, then the county court, after giving five days' notice to such person, shall proceed to determine and ascertain the property and its value, and shall impose on such person a fine not exceeding one hundred dollars.

County clerk to summon delinquents.

§ 4062. The county clerk shall issue summons in the name of the Commonwealth of Kentucky, in which shall be stated the offense in general terms against each of the delinquents, returnable to the next term of the county court, which shall hear and determine the cause, upon giving the defendant the right to have a jury to try the facts, if demanded before the trial is begun, which jury shall be composed of housekeepers, and summoned by the sheriff. If the defendant be found guilty, the court shall enter judgment for the fine and cost. The court shall assess the taxable property upon the statement of defendant, made upon oath, or upon such other evidence as he may be able to obtain, and execution shall be issued for the fine and costs. The amount of the assessment shall be certified by the clerk to the sheriff and Auditor of Public Accounts, and the tax collected and accounted for as other taxes.

Duty of county court.

§ 4063. The county court, before judgment is rendered against one reported in default, as above indicated, may, if it be satisfied that the defendant was not willfully in default, direct the clerk to take the list of taxable property of such delinquent in the manner prescribed by law. The list aforesaid shall be forthwith certified to the sheriff and Auditor,

to be charged to the sheriff, and accounted for by him as other revenue. In such cases the county court may excuse the delinquent from the payment of the fine upon the payment of the cost of the prosecution.

Persons not called on by assessor to give list—how.

§ 4064. Any person who has failed to give in his list of taxable property, in whole or in part, because he was not called upon by the assessor, may, at any time, and it is hereby made his duty, after the assessor has returned his books, to list the same with the county clerk, who, in taking the same, shall be governed by the laws regulating the duty of assessor.

Duty of assessor before he reports any one in default.

§ 4065. The assessor or his assistant, before he returns any one in default, shall apply at his residence, if a corporation at the place of business, for a list of his taxable property, and in case of his absence, leave a written notice with some person of the household over sixteen years of age, or put on the front door of the residence or place of business of the time and place such person shall meet the assessor in his county, and give in his list of taxable property; and if he fails to attend and give in such list, then the assessor shall report the person to the county clerk, and the clerk shall report such person to the supervisors, who shall assess and value his property.

§ 4066. If the assessor reports any one in default under the foregoing section without having performed the duties required of him in said section, he shall be fined ten dollars.

Sheriff's receipt in regard to taxes.

§ 4067. No sheriff shall receive or receipt for any taxes until a copy of the assessor's books, as approved by the board of supervisors, has been delivered to him by the county clerk, or the list filed in the county clerk's office has been certified to him by the said clerk. For a violation of this section the sheriff shall be fined one hundred dollars for each offense.

§ 4068. The county attorney shall prosecute under the preceding sections, and he shall receive for his services twenty-five per cent. of the amount recovered.

Assessor and deputies to list their property —how.

§ 4069. The assessor and his deputies shall give in the list of their taxable property to the board of supervisors, and in taxing said list the board shall be governed in all respects by the laws applicable to the assessor in listing property. On the failure of the assessor and assistants to so list their property, they shall be liable as delinquents, as hereinbefore provided, and be liable to the same penalties.

Assessor's accounts — how allowed and paid.

§ 4070. The assessor shall, after he has returned his tax-book, and the same has been corrected by the board of supervisors, present to the county court his accounts, which must be approved by the board of supervisors and verified by the affidavit of the assessor and his assistants, if any, stating the total assessed value of the property listed by them as shown by their respective tax-books, thus corrected; and if said court, upon investigation, find said account to be correct, it shall certify to the Auditor the amount due to the assessor for the services required of him by law, which shall be based on the total value of the assessment made by him as above required, as follows: Four cents on the one hundred dollars of the first million, and one and one-quarter cents on each one hundred dollars of the excess over one million; but no assessor shall be entitled to receive more than four thousand dollars for his services during any year. In counties in which the assessed value of property exceeds thirty-eight million of dollars, the assessor shall be allowed, as compensation to deputies appointed and qualified, the sum of one thousand dollars for each seven and one-half million dollars of property which may be assessed in excess of thirty-eight million dollars. In counties where the assessment does not exceed one million dollars, the assessor shall be paid four and one-half cents on the one hundred dollars of the entire property listed.

Duty fiscal court.

§ 4071. Before the county court shall grant such certificate of allowance, the assessor and his deputies, if any, shall, in open court, make and file the following affidavit, subscribed and sworn to by them before the clerk of the county court, viz: "I do swear that I have not received from any person a list of taxable property and returned the same until the

person rendering the list had made oath to the truth and value of the same; and I do further swear that I have, in no instance, assessed any property at a greater or less sum than I deemed a fair cash value, estimated at the price it would bring at a fair voluntary sale." Any assessor or deputy who shall make affidavit, knowing the same to be false in any particular, shall be deemed guilty of false swearing, and, on conviction, be punished accordingly.

Reduction against assessor for each list omitted, &c.

§ 4072. A reduction of fifty cents shall be made from the assessor's compensation for each list he shall fail to report for taxation, or report without authority of law, and one dollar each for each duplicate assessment. The Auditor of Public Accounts shall draw his warrant on the State Treasurer for eighty per cent. of such allowance, and shall draw his warrant on the Treasurer for the remainder due the assessor, as herein provided, after the October session of the fiscal court, on or before which time the sheriff shall report, on oath, to said court a list of all persons, with their taxable property so far as known to them, who were omitted by the assessor, also the names of any persons duplicated by the assessor. The report of the sheriff shall be certified to by the county clerk to the Auditor, that the deductions may be made from the assessor's claims, as herein provided.

Lands of non residents—assessment of.

4073. That it shall hereafter be unlawful for any assessor of this State to list any lands owned by non-residents of this State that have heretofore been sold, or that may hereafter be sold, and purchased by the State for taxes due thereon, except as hereinafter provided.

Taxes to be paid by owners.

4074. That the owners of all such lands that have heretofore been sold, or may hereafter be sold, and purchased by the State for taxes due thereon, shall be required to pay, in addition to the amount said lands were sold for, all taxes accumulated thereon after the sale of the same to the date of the redemption, to the officers now required by law to receive it.

Redemption of lands by owner.

4075. That whenever the owners of said lands shall redeem same, as provided in section four thousand and seventy-four, it shall then be the duty of the clerk of the county

court to certify said redemption to the assessor of the county, whose duty it shall be to list the same for taxation.

Penalty against assessor.

4076. That any assessor who shall list any of said lands in violation of this act shall be guilty of a misdemeanor, and fined not exceeding two hundred dollars for each offense.

Article III.

Assessment of Certain Corporations.

Corporations to pay franchise tax.

§ 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchises may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Auditor, Treasurer and Secretary of State, who are hereby constituted a Board of Valuation and Assessment for said purpose.

Franchise—how determined.

§ 4078. In oder to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section sixteen of

this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

Where lines extend beyond limits of State or county—how franchise valued.

§ 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following

facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

Corporation organized under laws of any other State—how franchise determined, &c.

§ 4080. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

§ 4081. If the corporation organized under the laws of this State or of some other State or government be a rail-

road, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the lines owned, leased or controlled in this State and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such line pass, or is operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district.

How franchise of certain corporations whose lines extend beyond limits of this State determined.

§ 4082. Whenever any person or association of persons, not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

Persons or associations having no capital stock and not incorporated—how franchise determined.

§ 4083. It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence the board may change the valuation as it may deem proper, and the action of the board shall be final.

Duty of Auditor to notify corporations.

§ 4084. The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the

Auditor to certify to county court clerk.

county clerks of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

§ 4085. The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.

Certain corporations to pay tax into Treasury.

§ 4086. All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

Penalty for failing to make reports.

§ 4087. Any corporation, or officer thereof, willfully failing or refusing to make reports as required by this chapter shall be deemed guilty of a misdemeanor, and for each offense shall be fined one thousand dollars, and fifty dollars for each day the same is not made after October first of each year.

Individual stockholders not to list—when.

§ 4088. The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchise as herein provided.

Corporation in hands of receiver to report.

§ 4089. Should any corporation required to make the report as hereinbefore provided be in the hands of, or under

the control of, a receiver or other person, it shall be the duty of such receiver or other person to make the returns and valuations as hereinbefore required.

Reports to be made—when.

§ 4090. Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.

Taxes due and payable—when.

§ 4091. All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

Banks and trust companies to report taxes due—when.

§ 4092. All banks and trust companies shall file the reports herein required by section two of this article, on or before the first day of March, 1893, and annually on or before March first, thereafter. Said reports shall be made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said reports or to pay said taxes as herein required, said banks and trust companies shall be subjected to the same fines and penalties as prescribed in section fifteen of this article.

Building and loan associations — assessment of.

4093. That the shares of building associations or building and loan associations shall be taxed as other individual personal property, and shall be listed with the assessor for that purpose by the owners of said shares, the amount so listed by every owner or shareholder to correspond with the amount paid in and not withdrawn by the said shareholder on the fifteenth day of September of every year; *Provided*, That the borrowing members shall not be required to list their shares, if the amount borrowed by such members equal or exceed the amount paid in on their respective shares. The shares of infants shall be listed by the parents or guardians of such infants. (Taxation of foreign associations. Sec. 4228.)

Surplus and profits to be listed.

4094. The president or secretary of every such building association, or building and loan association, shall list with the assessor the amount of such surplus funds and undivided profits as his association may have on hand and undistributed on the fifteenth day of September of every year.

Turnpike roads—assessment of.

4095. All turnpike road companies in the State, shall, by its president or chief officer, make out the reports required in this chapter, on blanks furnished by the Auditor, to the several county clerks of this commonwealth, who shall furnish, upon application, these blanks to the president or chief officer of every turnpike in or passing through his county. The president or chief officer shall fill out these reports, showing the exact financial condition in detail of the road, the whole length of the road, and the length of the road in each county, and shall, annually between the fifteenth day of September and the fifteenth day of October, make and deliver said report, verified under oath, to the county clerk of every county in which the road or any part of it may be located, and kept by said clerk as a public record. These reports shall be used by the board of supervisors of each county in ascertaining the value of the franchise of each road, or part of a road in their county, and they shall add the amount, if any so found, to the amount of tangible property assessed by the assessor, and the amount so ascertained shall be the whole amount of taxable value of said road.

The tangible property assessed by the assessor shall be subject to the supervision of the board of supervisors also. Any president or chief officer of a turnpike company who fails or refuses, or knowingly makes any false statement in his report, shall be deemed guilty of a misdemeanor, and for each offense shall be fined not less than ten dollars nor more than fifty dollars.

Article IV.

Assessment of and Payment of Taxes by Railroads.

Chief officer to report to Auditor.

§ 4096. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad lying in whole or in part in this State, shall, on or before the first of September in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company and the value thereof, and the respective counties, cities, and incorporated towns in which the same are located. That if any of said railroad companies owns or operates a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of September shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for

every day after the first day of September that he fails to file said report, to be recovered as indicated by section nine of this article.

Railroads in hands of receiver—duties of.

§ 4097. Should any railroad, or part of a line of railroad, in this State be in the hands or under the control of a receiver or other person, by order or decree of any court in this or any other State, it shall be the duty of such receiver or other person to make, under his oath, the returns and valuations required by the first section of this article; and should the president or chief officer of any railroad company, or such receiver, fail to make said returns and valuations on or before the first day of September in each year, the said Auditor shall proceed and ascertain the facts and values required by this article to be returned, and in such manner and by such means as he may deem best, and at the cost of the company failing to make the returns and values.

Auditor to lay reports before Railroad Commission—when.

§ 4098. The Auditor shall lay before the Railroad Commission, on or before the first day of October, the returns made to him under this act, and any schedules and valuations he may have made under the second section of this article. And should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose.

Duty of county superintendent of common schools.

§ 4099. It shall be the duty of the county superintendent of common schools in each county in which a railroad is operated to furnish, on or before the first day of July of each year, to such railroad company or companies, the boundary of each graded or common school district through or into which any part of such railroad or other railroad property is situated; and the county clerk of any county containing any other taxing district through or into which any

railroad is located shall make a similar report to such railroad company. Any county superintendent or county clerk failing to make the report as herein required, or shall make a false report, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than one hundred dollars for each offense.

Common school district tax.

§ 4100. All taxes against any railroad company, which shall be levied in any common school district, shall be paid to the superintendent of common schools of the county for the benefit of the district entitled thereto.

Not to apply to any colored school district.

§ 4101. The provisions of this law shall not be construed to apply to any colored school district: *Provided*, That the same rate of taxation assessed against the real estate of any railroad company or corporation in any graded common school district or common school district, in any year, shall be assessed against all of the taxable property in such district, and the railroad tax, when collected, shall be paid over to the county superintendent of the county in which the district school-house wherein the tax assessed shall be situated, and shall constitute and be held by the county superintendent as a graded or common district school fund; and the said fund shall be apportioned and distributed by the county superintendent between the white graded common school or white common school district wherein said tax shall be collected, and any colored common school district which shall be located over the same boundary; the distribution shall be in the ratio that the whole number of white children of pupil age and the whole number of colored children of pupil age residing in the district shall bear to the whole number of children, white and colored, residing in the district wherein such tax shall be collected.

Same rate for real estate to be levied on rolling stock, &c., for State purposes.

§ 4102. The same rate of taxation for State purposes which is or may be in any year levied on other real estate, shall be, and is hereby, levied upon the value, so found by said board, of the railroad, rolling stock and real estate of each company; and the same rate of taxation for the purposes of each city, town, county, part of a county, or tax district of any kind, in which any portion of any railroad is located,

Same also for city, town, county or tax district.

which is, or may be, in any year, levied on other real estate therein, shall be, and is hereby, levied on the value of the real estate of said company therein, and of the number of miles of such road therein, reckoned as of the value of the average of each mile of such railroad, with its rolling stock, as ascertained as aforesaid: *Provided*, That railroad bridges spanning any river, which constitutes the boundary or State line of the Commonwealth, shall be assessed as of the counties in which they are located, and local tax derived therefrom shall be applied to each city, town, county or tax district in which said bridges are or may be located; and immediately after the said board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the clerk of each county court of the amount so assessed for taxation in his county, and each railroad company of the amount of its assessment for taxation for State purposes and for the purposes of such city, town, county, part of county and tax district. And all existing laws in this State authorizing the assessment and taxation of the property of railroad companies by counties, cities or incorporated towns, are hereby repealed, and no county, city, or incorporated town in this State shall hereafter assess, levy or collect any taxes on the property of railroad companies in this State except as provided by this article.

As to railroad bridges spanning any river.

Taxes assessed against railroad company—when due.

§ 4103. All taxes assessed against any railroad company shall be due and payable thirty days after notice by mail of the assessment is given by the Auditor, and every such company failing to pay its taxes after receiving such thirty days' notice of the amount of such tax shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any railroad company failing to pay its taxes, penalty and interest, after becoming delinquents, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

§ 4104. Taxes, penalties and interest due the Commonwealth from any railroad company may be recovered by the Auditor of Public Accounts, by action in the name of the Commonwealth, in the Franklin Circuit Court; and those due any county, city, incorporated town or taxing district may be recovered by the officer authorized to receive the same, by action in the name of the Commonwealth in any court of competent jurisdiction. Taxes, penalties and interest—by whom recovered.

Article V.

Assessment of Distilled Spirits.

§ 4105. Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the fifteenth day of September and the first day of October of each year, report to the Auditor of Public Accounts, in writing, sworn to by the person making the report; or, if the owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouse on the fifteenth day of September in the year the statement is required to be made, the dates when made, the serial number of packages in which it is contained; the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon, if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the Auditor may require. Distillery bonded warehouse, owner to report—when.

§ 4106. That the said reports shall be, by the Auditor of Public Accounts, submitted to a board of valuation and assessment composed of the Auditor of Public Accounts, the Treasurer of the State and the Secretary of State, who are hereby constituted such board; and said board shall fix the values for purposes of taxation under this act, and assess the same accordingly, and shall keep a record of Board of valuation.

their valuations and assessments in a book provided for that purpose, and said record shall be evidence in all courts of the proceedings of said board.

§ 4107. The Auditor of Public Accounts shall file such reports with the board, which shall assess the spirits for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The board shall at once notify the owner or proprietor of the warehouse of the amount so fixed; and such owner or proprietor shall have thirty days, after receiving the notice, to go before the board and ask a change of the valuation, and may introduce evidence; and the board may make such changes as it may deem proper. The action of the board shall be final.

Values when fixed to be certified by Auditor.

§ 4108. Immediately after finally fixing such values, the board shall certify to the Auditor of Public Accounts the value of the spirits as assessed for State tax; and said officer shall certify to the county clerk of the respective counties the amount liable for county, city, town or district taxation, and the date when the bonded period will expire on such spirits. The report shall be by the county clerk filed in his office, and by him certified to the proper collecting officer of the county, city, town, or taxing district for collection.

Persons having custody of spirits liable for tax.

§ 4109. Any person or corporation having the custody of such spirits on the fifteenth day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from the day of payment.

§ 4110. Taxes on distilled spirits which may be assessed while in a bonded warehouse, and on which the United States government tax has not been paid, or will not become due before the first day of March after the assessment, shall be due on the first day of January, May and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear interest as other taxes.

§ 4111. Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said government tax shall have been paid, become due, or be removed from the warehouse, make and transmit to the Auditor of Public Accounts, and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement, sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the government tax has been paid or has become due, and what spirits have been removed from the warehouse during the preceding four months; the years in which such spirits were assessed for taxation; the serial number of packages in which it is contained, and the county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city or town to the officer entitled to receive the same.

§ 4112. On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest, within five days after the same becomes due, he shall be deemed delinquent, and a penalty of eight per cent. on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceedings to be instituted for the collection of such taxes, with such interest and penalties as may be provided by law for the collection of other delinquent taxes.

§ 4113. If any warehouseman or custodian of such spirits fail to make the report as required in section one of this article, the board shall ascertain the necessary facts therein required to be reported, and the same shall be assessed and taxes collected thereon, with interest and penalties, as though regularly reported.

§ 4114. Every person whose duty it is to make the reports as herein required, who shall willfully fail to do so, shall be deemed guilty of a misdemeanor, and, on conviction, be

fined not less than five hundred nor more than one thousand dollars; and any person who shall make a false report, with the intent to evade the payment of taxes, shall be deemed guilty of false swearing, and, on conviction, be punished as prescribed by law for such crimes.

Article VI.

Board of Supervisors.

County judge appoint supervisors—when.

§ 4115. The county judge, except in counties having a city therein of the first, second, third or fourth classes, shall, at the November term of each court, appoint five intelligent, discreet housekeepers, residing in different portions of the county; and in counties having a city therein of the first or second class, he shall appoint three additional persons from such city, and from different wards thereof; and in counties having a city therein of the third or fourth class, he shall appoint two additional persons from each city, and from different wards thereof, who shall constitute the board of supervisors of tax in their respective counties.

Duties of county clerk and sheriff.

§ 4116. The clerk of the county court shall make as many copies of the order appointing such supervisors as there are supervisors appointed, and one more, and deliver same to the sheriff of the county, who shall deliver a copy to each supervisor at least twenty days before the first day of January thereafter, and make due return thereof to the clerk of the county court.

Oath of supervisors.

§ 4117. The supervisors, before they enter upon the discharge of their duties, shall take the following oath: "You swear that you will, to the best of your ability, discharge the duties required of you as supervisor of tax, and that, in each instance where the property has not been assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, you will increase or decrease the value, and fix the value at what you believe the property would bring at a fair voluntary sale."

Penalty for failure to attend.

§ 4118. The failure to be in attendance promptly on the day fixed for the session of the board to begin shall, without

a reasonable excuse, subject the person or persons so failing to a fine of not exceeding twenty-five dollars; and the vacancy or vacancies so created, or from any other cause, shall be filled by the county judge.

Supervisors—when to convene.

§ 4119. The said supervisors shall convene at the county seat of their respective counties on the first Monday of January of each year; at the time of their meeting it shall be the duty of the county clerk to deliver to said supervisors the assessor's books for the county, which shall be considered by said board, in connection with other information, in ascertaining and fixing the fair cash value of property in the county, estimated at the price it would bring at a fair voluntary sale.

Duty of supervisors as to assessor's books.

§ 4120. The board of supervisors shall make a careful examination of the assessor's books, and each individual list thereof, and may increase or decrease any list; but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value, and shall list all property omitted by the assessor which may be subject to taxation in the county, and shall correct any errors of the assessors; and, in cases where the property has not been correctly valued, they shall fix the value thereof, and correct the assessor's books, so as to show the true value of the property, as herein provided; but should any property escape assessment by the assessor or supervisors, in whole or in part, it may be assessed as provided in section three, article thirteen.

Sessions of board.

§ 4121. The board shall continue in session at the first meeting not less than two nor more than six days, in counties not having a city therein of the first, second, third or fourth classes; and in counties having a city therein of the first class, may remain in session twenty days; and in counties having a city therein of the second class, the board may remain in session fifteen days; and in counties having a city or town therein of the third or fourth classes, the board may remain in session ten days. The clerk of the county court shall act as clerk of the board of supervisors. He shall be allowed the same compensation for his services

as a member of the board, and be paid in the same way. It shall be the duty of said clerk to make out and deliver to the sheriff a list of the names of all persons whose property has been raised by the board of supervisors, and the amount thereof.

Duty of sheriff.

§ 4122. The sheriff shall notify all such tax-payers whose lists have been increased or assessed by the board, and also notify them of the time to which the board adjourned. Notice to non-residents or infants shall be to their attorney or agent or guardian; if none in the county, by posting in some conspicuous place on the premises. The sheriff shall be allowed a reasonable compensation for his services, to be paid out of the county levy.

Board to hear complaints and powers thereunder.

§ 4123. The board, in reassembling, shall hear all complaints, and pass finally upon the assessment of all tax-payers, and from such action there shall be no appeal; and for that purpose the board, in counties having therein a city of the first or second class, shall remain in session not less than one nor more than ten days, and in other counties not less than one nor more than five days. The board may summon and swear witnesses, and require them to testify. Any person who shall willfully fail to obey the summons of the board, or shall refuse to testify before it when required, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than twenty-five nor more than one hundred dollars for each offense.

§ 4124. If the board, during its session, find any property which has not been assessed, and for which they can find no owner, they shall describe and locate such property, and assess the value thereof.

Board to keep a record.

§ 4125. The board of supervisors shall keep a record of their proceedings, and correct the tax-books thereby. They shall annex their certificate to the tax-books that they have examined and approved the same, and the number of days they were actually engaged, and shall return the same, with the record of their proceedings, to the county clerk on or before the tenth day of February.

§ 4126. The clerk shall certify to the county court the approval of the tax-books, and the county court shall enter the fact of record; also, the amount due the supervisors for their services. On a presentation of a copy of the order, the Auditor shall draw his warrant on the Treasurer in favor of the assessor for the portion of his claims, as provided by law, and the amount due the supervisors and clerks for their services.

Duty of clerk to certify approval of tax-books.

§ 4127. The supervisors and clerks shall be allowed three dollars per day for each day they may be necessarily employed, to be paid out of the State Treasury.

Pay of supervisors.

§ 4128. Any informality or irregularity in the execution of their duties as supervisors, and any failure of duty on their part, shall not render any assessment invalid.

Article VII.

Collection of Revenue.

§ 4129. The sheriff, by virtue of his office, shall be collector of all State, county and district taxes, unless the payment thereof is, by law, specially directed to be made to some other officer.

Sheriff to be collector.

§ 4130. The sheriff shall, on or before the first Monday in January next succeeding his election, and on or before the said day annually thereafter, enter into bond, with surety, for the faithful performance of his duties. A quietus by the Auditor for the revenue tax for the preceding year shall be produced by each sheriff to the county court on or before that day, and no tax-book shall be delivered to a sheriff after the first year of his term who shall fail to exhibit such quietus on or before such date. He may execute bond at any time after he receives his certificate of election up to and including the first day of January succeeding his election, and it shall be the duty of the judge of the county court to hold a court at any time the sheriff may request for that purpose. The county court shall judge of the sufficiency of the surety, and in no case shall sureties be taken

Bond of sheriff.

who are not jointly worth, subject to execution after the payment of all their debts and liabilities, a sum equal to the aggregate amount of money which may probably be received by the sheriff during the year succeeding the execution of the bond. The Commonwealth, the county and any taxing district shall have a lien from the date the sheriff begins to act upon the real estate of the sheriff therein secured or afterwards acquired by him, which shall not be discharged until the whole amount of money collected by the sheriff, or for which he may be liable to them respectively, shall have been paid, and the same lien shall exist upon the real estate of a usurper of the office of sheriff or a *de facto* sheriff, or any person who may act as sheriff.

Failure to execute bond forfeits office.

§ 4131. On the failure of the sheriff to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all moneys due the State and county or taxing districts authorized to be collected by the sheriff, or it may appoint a separate collector of the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the county court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the county court, and if the bond be not executed within said time, the appointment of another collector may, in like manner, be made and qualified.

Sheriff forfeiting or resigning disqualified.

§ 4132. No sheriff who shall forfeit his office under the preceding section, or who shall resign his office, shall be appointed collector for the county, or elisor or deputy collector or deputy elisor; and if such appointment be made, he shall receive no compensation for his services as such.

§ 4133. The bond of the sheriff or collector shall be in substance as follows:

Sheriff's bond.

We, A B (sheriff or collector, as the case may be), and C D and E F, his sureties, bind and obligate ourselves,

jointly and severally, to the Commonwealth of Kentucky, that the said A B (sheriff or collector, as the case may be) shall faithfully perform his duties.

Witness our signatures this — of ——. The bond shall be executed in duplicate, one of which shall be filed and recorded in the county clerk's office, and the other shall be sent to the Auditor of Public Accounts and filed in his office.

Sheriff may be required to give additional bond.

§ 4134. The county court may require the sheriff to give an additional bond or bonds, with good surety, to be approved by the county court, whenever it may deem the interest of the State or county demands; and the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of such bond or bonds.

Outgoing sheriff—duties of.

§ 4135. The outgoing sheriff, as soon as his successor has been qualified and his bond approved, shall immediately vacate his office, deliver to his successor all books, papers, records and other property held by virtue of his office, and shall make a full and complete settlement of his accounts as sheriff. On the failure of any outgoing sheriff for ten days to comply with the provisions of this section, he shall be deemed guilty of a misdemeanor, and, on conviction, be fined a sum not less than fifty nor more than five hundred dollars, and be liable on his bond for any default.

If sheriff die, right of sureties.

§ 4136. If the sheriff shall die during his term of office, his sureties shall have the right to nominate a person to collect the revenue for that year, and upon their written nomination of such person he shall be appointed by the county court, and the sureties shall remain liable to the Commonwealth for the taxes with which their principal was charged: *Provided*, That this section shall not apply when in any case the sureties, in the opinion of the county court, are not in the aggregate worth, in property subject to execution, above their debts, the amount of the taxes with which their principal was charged.

Sheriff to keep office at county seat.

§ 4137. The sheriff shall keep his office at the county seat of the county, in a room or rooms to be provided for that purpose by the fiscal court. He shall keep an accurate account of all moneys received by him, showing the amount thereof, the time when and from whom received, and on what account, also of all disbursements made by him, the amount thereof, to whom paid, the time of payment, and on what account; and he shall so arrange and keep his books that the amounts received and paid on account of separate and distinct or specific appropriations will be exhibited in separate and distinct accounts. He shall balance his books on the first day of each month, so as to show the correct amount on hand belonging to each fund on the day the balance is made.

Sheriff's books open to Auditor, &c.

§ 4138. The books of the sheriff shall at all times be open to the inspection of the Auditor of Public Accounts, the Auditor's agent, the fiscal court, or any member thereof, the Commonwealth's and county attorney, or any person having an interest therein.

Auditor to adopt form of book-keeping.

§ 4139. It shall be the duty of the Auditor of Public Accounts to adopt a form of book-keeping for the several sheriffs, and all sheriffs are required to keep their books and accounts in the manner required by the Auditor of Public Accounts; and on the failure of any sheriff to keep his books in an intelligible manner, and according to the form as prescribed by the Auditor of Public Accounts, and to make the entries as required by law, he shall be deemed guilty of a misdemeanor, and for each offense be fined not less than fifty ($50) nor more than ($200) two hundred dollars.

Sheriff's office to be kept open.

§ 4140. The sheriff shall keep his office open for the collection of moneys which he may be entitled to receive at all reasonable times, except on Sunday and legal holidays; and, when any money is paid him, he shall immediately enter the same upon his books, and give to the person paying it a receipt therefor, specifying therein the amount, and on what account the same was paid, and when paying any money he shall take a similar receipt. He shall retain the amount of tax and other public dues against any person or

corporation out of any claim allowed by the Commonwealth or the fiscal court to such person, except claims allowed for attendance as a witness, notwithstanding any assignment of the same.

Sheriff may appoint deputies—how.

§ 4141. The sheriff may, with the approval of the county court, appoint one or more deputies, and take bond to himself for the faithful discharge of the duties of such deputies; but in all cases the sheriff shall be liable on his bond or bonds for any misconduct or default of such deputies; any deputy may be removed at any time by the sheriff.

Sheriff to visit each justice's district.

§ 4142. The sheriff or one of his deputies shall, at least once every ninety days, between March first and November first, visit each justice's district of the county for the purpose of receiving taxes; and he shall give notice of the time and place where he will receive taxes in such districts by written or printed notices, posted at three or more public places therein, for not less than ten days before the day designated for that purpose.

State, county and district tax—when due.

§ 4143. All State, county and district taxes, except as otherwise specially provided, shall be due and payable on and after the first day of March after the assessment, and the sheriff or collector of the State revenue in each county of this Commonwealth shall, on the first day of May, and every sixty days thereafter, under oath, report to the Auditor of Public Accounts the amount of taxes he has collected, and pay the same immediately, and shall account for and pay all taxes for which he is bound into the State Treasury by the first day of December in each year; and upon his failure to do so, he and his sureties shall be liable therefor, and shall be proceeded against at the first term thereafter of the Franklin Circuit Court. Any person or persons failing to pay their taxes by the first day of November in the year following the assessment for such taxes shall pay six per cent. additional on the tax so due and unpaid. Any sheriff who shall fail to report as herein required shall be liable to indictment in the Franklin Circuit Court, and fined not less than one hundred dollars nor more than five hundred dollars for each offense; and it shall be the duty of the Auditor

to report to the grand jury of Franklin county, at the next term of said court after such failure to report, the name of such sheriff so failing to report. The sheriff shall be required by the Auditor to pay a penalty of six per cent. on all taxes due and unpaid by him on the first day of December in each year. The Auditor, in his settlement with the sheriff, shall charge him with the several penalties accruing under the provisions of this section.

Sheriff not to be concerned in any public improvements.

§ 4144. No sheriff shall be concerned or interested, directly or indirectly, in the construction of any public works or improvements made or undertaken, in which the county shall be directly or indirectly interested, or on which he may be required to pay money, nor speculate in any claim against the State or county. Any sheriff violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined a sum not less than five hundred dollars and not more than two thousand dollars for each offense.

Unlawful to use public money other than for purposes collected.

§ 4145. It shall be unlawful for any sheriff to apply or use any money received by him for any purpose other than that for which such money shall have been paid or collected; every such misapplication shall be deemed a misdemeanor; and, on conviction, the sheriff shall be fined not less than one hundred nor more than five hundred dollars for each offense.

Sheriff to settle—when.

§ 4146. Each sheriff shall, when required by the fiscal court, settle his accounts of county or district taxes; and at the regular October term of each year the fiscal court shall appoint some competent person to settle the accounts of the sheriff of money due the county or district. The report of such settlement shall be filed in the county court clerk's office, and be subject to exceptions by the sheriff or county attorney, who shall represent the Commonwealth and county, and the county court shall try and determine such exceptions. An appeal may be prosecuted by either party from the judgment of the county court on such settlement, in the same manner as provided by law for appeals from judgments of the quarterly court, except that the county attorney should

not be required to give an appeal bond, or actions may be instituted in any court of competent jurisdiction to correct the settlement; and the settlement, when approved, shall be recorded in the county clerk's office.

Sheriff or collector to report—when.

§ 4147. The sheriff or collector of the State and county revenue of each county of this Commonwealth shall, on the first day of May, and every sixty days thereafter, under oath, report to the county court the amount of State and county taxes he has collected, together with all fines, forfeitures or money on any other account; showing in said report the amount collected for and belonging to each particular fund. Said reports shall be filed and recorded in a separate book, and be open for inspection in the office of the county clerk. The sheriff shall be required by the fiscal court to pay a penalty of six per cent. upon all taxes levied by said court that remain due and unpaid by him to the proper parties or funds on the first day of December in each year, and the person appointed to make a settlement with the sheriff shall also ascertain the amount of the above penalty, and charge same to the sheriff. Any sheriff who shall fail to report, as herein required, shall be liable to indictment in the county of his residence, and fined not less than one hundred dollars nor more than five hundred dollars for each offense.

Sheriff may distrain—when.

§ 4148. The sheriff, from and after the first day of March in each year, shall collect the taxes due in his county, and upon failure by the persons bound therefor to pay the same, may distrain the goods and chattels owned by or in the rightful possession of the persons from whom the tax is due, notwithstanding the existence of any lien upon the same; and may proceed to sell the title of such person in so much thereof as will pay the tax due and all costs, in the mode prescribed by law. Sheriffs shall be allowed by the Auditor the following commission upon the sums collected and accounted for or paid into the Treasury in each year: Upon the first five thousand dollars, ten per cent., and upon the residue four per cent.: *Provided*, That in no case shall the aggregate annual compensation of the sheriff for official services exceed five thousand dollars, independent of the compensation of legally authorized deputies and assistants.

Duty of sheriff before he makes levy.

§ 4149. The sheriff, before he makes a levy for taxes, shall demand the same from the person from whom the tax is due, if resident of and in the county, and tender a receipt therefor if it be required, in which he shall specify the taxable estate with which such person is charged, the value and amount thereof, and the tax due. If he shall distrain before the demand, if the tax-payer is a resident of and in the county, and before he tenders the receipt, if it be required, he will forfeit and pay to the person aggrieved double the amount of such tax, and such damages as he may sustain, to be recovered by action in his own name: *Provided, however,* He may distrain without the demand after the first day of July of the year for which the tax is due: *And provided further,* That if the sheriff has reasonable grounds to believe that the person from whom the tax is due is about to remove his property from the county, or to conceal the same, he may distrain at any time without the demand.

§ 4150. The sheriff shall, after having advertised at the court-house door the time and place of sale for at least ten days, sell at public auction, for money, so much of the property levied on for taxes as will pay the tax and costs. If the sheriff make illegal or unreasonable seizure and levy for taxes, he shall be liable in damages to the party aggrieved.

§ 4151. If there be no personal property that the sheriff or tax collector can distrain for taxes due, and the same shall not be paid by the first day of July, the sheriff or tax collector shall sell for cash any real estate belonging to or listed by such delinquent tax-payer, or so much thereof as will pay the taxes due and his commission, in the same manner that lands are sold under execution, except that the land shall not be valued or levied on, and shall be advertised by posting, for fifteen days before the sale, a written or printed notice at the court house door, and by publication once a week for four weeks prior to the day of sale in a newspaper of general circulation, if there be one in the county; if not, then by printed handbills posted for fifteen days before the sale at the court house door and in three or more conspicuous places in the tax district; and he shall, not less than

fifteen days before the sale, mail to the delinquent a postal card addressed to his place of residence or place of business, if such can be ascertained, notifying him of the time and place of the sale; and in order to cover the cost of such advertisement and notification, the sheriff shall have two dollars for each person whose property is advertised, to be paid by the delinquent, but in no event to be paid by the State.

Sheriff to bid for land sold—when.

§ 4152. If no one will bid for and purchase such land at the amount of tax, the charges due and the cost of sale, including the cost of advertising, it shall be the duty of the sheriff or collector to purchase the same for the State of Kentucky, for the amount of tax due and the commission thereon, and shall make return to the county clerk, who shall record the same in a book kept for that purpose, and the clerk shall certify the same to the Auditor of Public Accounts, and the sheriff or tax-collector shall have a credit for the same in his settlement with the Auditor. The clerk shall have a fee of twenty-five cents for making such entry. The owner of such real estate, his representatives, heirs or assigns, shall have the right to redeem the same from the State, or any other purchaser, at any time within two years after the day of sale, by paying the purchase money, with interest at the rate of thirty per cent. per annum, and in addition fifteen per cent. upon the total amount of the purchase price and the amount of the clerk's costs, if any. The State shall have the right of possession of lands purchased by it at any time after the expiration of thirty days from the giving of the notice provided for in the next section, and the purchaser, other than the State, shall have the right of possession of the lands purchased by him at any time after the expiration of six months from the giving of the notice provided for in the next section.

Duty of county attorney.

§ 4153. It shall be the duty of the county attorney for each county, within fifty days after the sale, to notify the owner of land purchased by the State of such purchase; and if the land so purchased be not redeemed within thirty days from such notification, he shall institute proceeding for the recovery of the possession of such land; and if such land be

redeemed after such proceedings are instituted, the owner shall, in addition, pay the costs of such proceeding. The failure of the county attorney to give such notice and institute such proceedings within the time specified shall subject him to a fine of twenty dollars for each offense, and it is hereby made the duty of the county judge to report each and every such failure to the circuit court at its next term thereafter, whereupon the circuit judge shall cause to issue a rule against said county attorney to show cause, if any, why said fine shall not be entered up against him, and such fine, when collected, shall be for the benefit of the State. In every case where such lands are redeemed from the State, the county attorney shall have as his commission, when he attends to his duties, twenty per cent. of the amount of money paid to redeem such land; but if he shall fail to attend to his duties, he shall receive no commission, and the whole of the redemption money shall belong to the State. It shall be the duty of the purchaser other than the State, within fifty days after the sale, to give notice in writing to the owner of land purchased by him of such purchase, and if such land be not redeemed within six months after said notice, he may institute proceedings for the recovery of possession of such land.

Right to redeem land sold—when.

§ 4154. If the land be not redeemed within the two years allowed for that purpose, the fee-simple title thereto shall vest absolutely in the State; and if said lands purchased by individuals be not redeemed within the two years allowed for that purpose, the fee-simple title shall at once vest in such individuals. The State may, at any time after the period for redemption has expired, sell and convey such land for such price and in such manner as may be directed by the Auditor of the State.

Persons injured may have remedy—when.

§ 4155. Any one injured by a failure in, or the improper performance of, the duties of the assessor or sheriff, shall have a remedy on his official bond, and the criterion of his recovery shall be the value of the property lost by reason of such failure. No such action shall be maintained, unless such person shall allege and prove that he made diligent

effort to have such property assessed, and offered to pay the tax thereon, and on all other real property of his liable to assessment.

Right of minor, &c., to redeem allowed.

§ 4156. Any minor, or other person laboring under legal disability, except a lunatic or married woman, at the date of sale, shall have one year after the removal of the disability within which to redeem such property, which may be done by paying the purchase money, with fifteen per centum on the amount thereof, and interest at the rate of thirty per cent. per annum from the date of the sale, and the costs of the sale. But any purchaser, other than the State, shall forfeit his right to his purchase, unless, within six months after the sheriff shall have delivered to him a certificate of his purchase hereinafter provided for, he shall, in writing, give notice of his purchase to both husband and wife, in case the purchase be of the land of a married woman; or to the statutory guardian of an infant, if there be one; if not, to the parent; if none, to the persons having in charge such infant, if the purchase be of the land of an infant; or to the committee of the lunatic, if one; if none, then to the person having charge of such lunatic, if the purchase be of the land of a lunatic. If the lands of a lunatic or married woman be not redeemed within five years from the reception of the notice, the sale shall become absolute.

Notice.

§ 4157. If, after receiving such notice, the guardian of an infant or committee of a lunatic fail to redeem such lands, he shall be liable on his official bond for all damages incident to such failure.

Certificate of purchase.

§ 4158. The sheriff shall, within thirty days after the sale, give certificates of purchase describing the land, and stating the time of sale and the price for which said land sold, to all purchasers of lands; and in all cases where the purchaser of such lands is the State, the sheriff shall, within six months, give the notice required by the twenty-eighth section; and for a failure on his part to do so, he shall be liable on his official bond for all demages incident thereto, but the title of the State shall not be thereby affected; but if the owner of land purchased can not be found, then the

notices required by sections eighteen, twenty-eight and thirty shall be served as follows, viz: First, upon any member of his family in the county over sixteen years of age; if none, then, second, upon his agent, if any in the county, and if none, then, third, by a printed or written notice, posted at or near the court-house door, and on or near the premises.

When to convey to purchaser.

§ 4159. When the right to redeem shall have expired, the sheriff then in office shall convey to the purchaser the property described in his certificate of purchase, for which deed he shall be allowed a fee of one dollar, to be paid by the grantee in the deed.

§ 4160. If the purchaser be the State, the land may be redeemed for an infant at any time during the infancy, and by him within one year after his maturity, by paying the amount necessary to the county clerk, who shall enter upon the book mentioned in section thirty-four the word "redeemed" after the description of the land, and shall sign his name, in his official capacity, to said entry. The lands of a married woman or lunatic may be redeemed at any time within the period mentioned in section twenty-eight in the same manner.

Right of non-resident to redeem

§ 4161. If the purchaser be a non-resident of the county, having no known agent in the county, or if, being a resident, he can not be found at his usual place of abode, the lands may be redeemed within the time and in the manner stated in the last preceding section; but if he be a resident of the county, and can be found at his usual place of abode, or if he, being a non-resident, has a known agent, who can be found at his usual place of abode, the redemption money must be paid to the purchaser or his agent, as the case may be; and in every case the certificate of purchase shall be surrendered to the party redeeming, who shall, by exhibiting the same to the county clerk, be entitled to have the claim released of record, as in the last preceding section described.

Sheriff to report sale.

§ 4162. Within twenty days after the sale the sheriff shall, in his official capacity, make report, in writing, to the

county clerk, showing when the sale was made, the steps taken by him with reference thereto prior to and at the sale, to whom, for what price the land was sold, giving a description of the land sold as fully as he is able to do, which report shall be recorded and indexed by the county clerk in a book to be provided by him for that purpose. The sheriff shall at once notify the county attorney of the filing of said report. Said report, when recorded, shall operate as a conveyance, and vest the title to the property of all persons *sui juris* in the State when purchased by the State, and shall be constructive notice to the world of the claim existing in favor of the purchaser, whether the State or an individual, against the lands of persons laboring under no legal disability. If the sheriff shall fail to make said report, he shall be subject to indictment in the circuit court, and, upon conviction, shall be fined not less than five hundred nor more than one thousand dollars; but the title of the State shall not thereby be affected, and said report may be afterwards filed and recorded with the same effect as if filed and recorded at the proper time.

§ 4163. If the sheriff fails to make the return of sale to the county clerk heretofore provided for, any individual purchaser may file with the county clerk the sheriff's certificate of purchase which the clerk shall record and index in the book aforesaid, and the same shall have the same effect as the sheriff's report would have had if returned.

§ 36. Copies of the records aforesaid, certified by the county clerk, shall be evidence of the facts stated in them in all the courts of this Commonwealth.

§ 4164. If any clerk shall fail to pay the redemption money to the person entitled thereto upon demand, he and his sureties shall be liable for the same and twenty per cent. interest thereon annually from the time he received it until paid. Redemption money.

§ 4165. The clerk shall be allowed for his services under the foregoing one cent for each line of the book employed in recording the report, and he shall be paid thirty cents by the delinquent who redeems property for each release made by the clerk.

§ 4166. If any sheriff shall knowingly sell the same tract or parcel of land more than once, he shall be fined one hundred dollars, and be liable upon his official bond for all damages which may be sustained by any party aggrieved.

When only portion of tax collected.

§ 4167. In all cases where only a portion of the tax is collected on State, county or district tax, the amount recovered shall be by the sheriff apportioned between the State, county or district in the same proportion the amount due to each bears to the amount recovered.

Article VIII.

Collection of Taxes and Other Public Money by Action.

Equity proceedings to be instituted—when.

§ 4169. On the return of "no property found," on an execution issued upon a judgment in favor of the Commonwealth, the Auditor of Public Accounts may cause equitable proceedings to be instituted in the Franklin circuit, or any other court of competent jurisdiction, as he may elect, in the name of the Commonwealth, and the choses in action, or other equitable estate of the delinquent, shall be subjected to the payment of the amount due on any such execution. It shall be the duty of the Attorney-General, or of the Commonwealth's attorney of the district in which said action is instituted, if instituted in other than the circuit court of Franklin county, to prosecute all such suits for the State; but no action shall be maintained under the provisions of this section when the last execution issued has been returned "no property found" more than ten years before the institution of such suit.

Penalty.

§ 4170. All persons or corporations against whom an execution has been returned "no property found," and upon which an equitable action is instituted, as provided in the preceding section, shall be liable for and pay a penalty of twenty per cent. on the amount due on such execution, which penalty may be recovered in such equitable action, with the amount due on the execution; and the Attorney-General or Commonwealth's attorney who prosecutes such action and

recovers the tax due the Commonwealth shall be entitled to the said penalty, or so much thereof as may be recovered.

When suits instituted.

§ 4171. Suits and motions against sheriffs, clerks, or against them and their securities on their official bonds, or their heirs, devisees or representatives, and all other persons required to pay money into the State Treasury, or to do any other act required by law to be done connected with the payment of money into the State Treasury after it has been collected, may be instituted in the Franklin Circuit Court, and prosecuted as prescribed by law.

Auditor to mail notice.

§ 4172. The Auditor shall, twenty days before the first day of the term of court, mail to any of the parties named in the preceding section, who may be liable, directed to them at the post-office at the court-house of the county of the person aforesaid, a notice, in writing, stating the amount judgment will be asked for, and the time the court will be held. The Auditor shall file a copy of this notice, with the name of the person to whom sent, the time when, and the place where sent, with the clerk of the court, to be by him filed and kept with the papers in the motion or action.

Duties of court on motion.

§ 4173. The court, without further or other notice to the parties, shall proceed with the motion or action, which shall be docketed for trial on the third day of the term. The Auditor shall file with the clerk of the court a memorandum, in writing, of the names of the parties, the amount due from each defaulter against whom judgment is demanded, and also a copy of the bond, if any. The clerk shall docket said motions or actions in the order in which the names stand on said memorandum.

Judgments.

§ 4174. Judgments, when given against the defendant, in the cases referred to in the preceding sections, shall be for the principal due, with interest at the rate of ten per centum per annum from the time the amount was due until paid.

If bond is denied duties thereunder.

§ 4175. If any of the defendants shall, upon oath, deny the execution of the bond or instrument whereby they are sought to be made liable, a jury, if required, shall be empaneled to try the facts. All other facts may be tried by the court. Nothing but a receipt from the Treasurer for the

payment of the taxes or money claimed shall be admitted on the trial, except orders of court and receipts in pursuance thereof, the record of the Auditor's and Treasury Departments and delinquent list. No tender of payment nor any offset shall be pleaded or given in evidence.

What judgments shall bind.

§ 4176. Judgments in the name of the Commonwealth or county against sheriffs and other public collectors, their sureties, or their heirs, devisees, or personal representatives of any of them, shall bind the estate, legal or equitable, of all the defendants to said judgments from the commencement of the action or motion till satisfied. No execution thereon shall be stayed by replevin or sale on credit; but in all such cases the estate taken in execution shall be sold for money: *Provided*, The Auditor is allowed, with consent of Attorney-General, to indorse the right to replevy on the execution where the tax is payable to the Auditor; and like privilege is given the sheriff, with the consent of the county attorney, when the taxes are payable to the sheriff.

Right to replevy.

False return.

§ 4177. If any officer shall make a false return on such execution, he shall be fined twenty dollars upon notice and motion, and be subjected to the payment of the whole amount of said execution and costs.

Officers—when liable.

§ 4178. Officers and their deputies failing to levy executions in the name of the Commonwealth or county, or withholding any such executions, and not making return thereof for one month after the return day, or failing to pay the money when collected, shall, together with their sureties, be liable for the amount of said execution, and twenty per cent. damages thereon, to be recovered by action or motion in the name of the Commonwealth by the county attorney.

When estate is encumbered.

§ 4179. When the estate of the defendant in execution, upon judgment against defaulting public officers, is encumbered by a previous *bona fide* mortgage, deed of trust, or other encumbrance or prior lien, the officer shall, if no other property be found upon which to levy the execution, levy it upon the encumbered property and return the same, and shall make return of all the facts known to him, or of which he is informed, giving the date and consideration of such

deed, to whom made, when recorded, the evidences of any prior lien, and the names of the parties who claim the same. Proceedings may be instituted by the sheriff or Auditor in the name of the Commonwealth in the county where the property is situated, for a sale of the property, and to have the claims and demands, if just, satisfied, and all encumbrances removed, and the proceeds of the sale of the estate rightfully applied.

§ 4180. If any person shall attempt to stop or injure the sale of estate under execution by any fraudulent execution, conveyance, encumbrance, or otherwise, he shall be fined not less than five hundred dollars.

§ 4181. If return be made on executions against a sheriff or other public defaulters to the State and their securities, that there was no sale of personal property for the want of bidders, the Auditor may direct the estate levied upon to be removed from county to county for sale, as often as may be necessary, the cost of removal to be paid out of the sale of the estate as other costs; and the officer who levied the execution shall have power to sell the same in any county to which the estate may be removed. If real estate be levied upon, the place of sale may be changed to another county, and the officer shall have the same power and authority to sell and convey said estate which he had in the county where the levy was made.

Franklin circuit to have jurisdiction.

§ 4182. The Franklin Circuit Court and circuit court of the county shall have jurisdictions of all motions and actions in law or equity necessary to be instituted by the Auditor to enable him to collect the public revenue and other demands and penalties due the Commonwealth, or to have satisfaction made of judgments in favor of the Commonwealth.

§ 4183. The Commonwealth, at the instance of the Auditor, may have executions in the hands of collecting officers in any number of counties at the same time.

Article IX.

Collection of Taxes by Attachment.

Collecting of taxes by attachment.

§ 4184. If the sheriff, his deputy, or other person having revenue, county levy, or other taxes of any character, or other public dues, in his hands for collection, believes another person to be indebted, in money or property, to the person owing taxes or public dues, and believes he can not otherwise collect the tax, he shall deliver, or cause to be delivered, to the person owing the taxes or public dues, and to the person owing him, anywhere he may be found, written notice in substance as follows:

"Mr. A B, the taxes due by C D amount to the sum of $————, ———— cents. To that extent you are notified not to pay or deliver to him any money or property which you now owe, or may hereafter be indebted to him, and to appear before the county court of ———— county, on the first day of its next term, to show cause why you should not be adjudged to pay said taxes. This —— day of ————, eighteen ——.

"———————— Sheriff."

Notice shall operate to enjoin.

§ 4185. This notice shall be signed by the sheriff, his deputy, or by the collector, and shall operate to enjoin the person named in it from paying the amount mentioned in the notice, money, property, notes, accounts and other things of value, owing at the time of the service of the notice, or accruing thereafter, until the matter is heard by the county court. On the hearing by the county court, the debtor of the delinquent shall be compelled to disclose, in open court, all matters of account and indebtedness, whether for money, property, or labor, owing at the date of the notice or incurred thereafter. The court shall direct the said debtor to pay or deliver to the sheriff or collector any money, property or other thing then, or at the time notice was served, due said delinquent, or to the extent of such taxes and costs, or to the extent of his lia-

bility, including such as accrued after notice, though paid or discharged; and if it be property, the sheriff shall sell the same, after advertising by handbill, posted at the court-house door for ten days. If the person so indebted to the person owing taxes fail to attend, or fail to make disclosure, the court shall render judgment against them for all the taxes.

§ 4186. The person owing taxes shall not be discharged from liability for them until they are fully paid, or the amount realized under the proceedings aforesaid.

§ 4187. All persons indebted to the person owing the taxes may be included in the same notice, though residing out of the county of the sheriff or collector.

§ 4188. The proceedings shall be docketed in the name of the Commonwealth, and, if necessary to the interest of the Commonwealth, the court may cause other parties to be brought in before it, and made party to the proceedings.

§ 4189. The court may hear evidence, and, in its judgment, shall provide for the payment of the State revenue, the county levy due, and, if there be other taxes due, the court shall direct the payment thereof, provided that the delinquent shall have the right to defend by showing, first, that the property has never been assessed, but it shall not be sufficient to show a defective assessment merely; second, that the property is not subject to taxation; third, that the taxes have been paid.

Article X.

License Tax.

Subdivision I. General provisions concerning.
Subdivision II. Taverns, merchants, distillers, druggists.
Subdivision III. Peddlers.
Subdivision IV. Amount of license tax.

License granted by county clerk.

§ 4190. All licenses, except as otherwise specially provided, shall be granted by the clerk of the county court of the county in which the business is proposed to be conducted,

and shall be issued in writing and on blank forms, with stubs and duplicates attached to each, to be numbered consecutively, and to be prepared by the Auditor of Public Accounts, and furnished to each county clerk, from time to time, as may be necessary for use in his office.

Form.

§ 4191. The following shall be the form of license, duplicates and stubs, as herein required:

Stub No. —. $———.

License issued to ———, by which ——— is authorized to ———, until the —— day of ———, 18—. Amount of tax $——. Issued this —— day of ———, 18—.

Clerk ——— *County Court.*

——————Perforated line——————

Duplicate No. —. $———.

This is to certify, that on the —— day of ———, 18—, license was granted to ———, by which ——— was authorized to ——— until the —— day of ———, 18—, on the payment of $—— to me.

This the —— day of ———, 18.

Clerk ——— *County Court.*

——————Perforated line——————

Original No. —.

This is to certify, that on the —— day of ———, 18—, license was granted to ———, by which ———; is authorized to ——— until the —— day of ———, 18—.

This the —— day of ———, 18—.

Clerk ——— *County Court.*

License not to authorize business on Sunday.

§ 4192. License shall not confer any authority on any person to engage in the business or sell the article named in the license on Sunday, or on any other day on which the law may prohibit the business or sale.

§ 4193. No person shall be granted any license to conduct any business or sell any article, for which a license tax is required, who has engaged in such business, or has sold any such article without license within six months next preceding the time the application is made, who will not, in addition to the regular license tax, pay a sum equal to twenty per cent. thereof; nor shall license be granted to any person who refuses to answer, under oath, at the time the application is made, whether he or his agent have, within six months next before the time of the application, been guilty of engaging in such business, or selling such article without license therefor; and any person making a false statement on such examination shall be deemed guilty of false swearing. Persons prohibited from license.

§ 4194. The Auditor of Public Accounts shall keep a strict account against each county clerk of the blank licenses furnished them, respectively, and it shall be the duty of each clerk, when he shall have used all the blanks furnished by the Auditor at any one time, to transmit to the Auditor all stubs of such blanks; and, on the retirement from office of any county clerk, he shall transmit to the Auditor all blanks not used by him, together with all stubs of blanks which have been used.

§ 4195. When each license is granted, the county clerk shall fill up the original and stub. The original he shall deliver to the person to whom it is granted, and shall, within two days thereafter, forward the duplicate to the Auditor of Public Accounts, who shall charge the amount of the tax to him, and the clerk shall, once in each month, pay the license tax collected into the State Treasury, and at the time the money is paid file a statement thereof with the Secretary of State; and said clerk, as compensation for his services, shall be allowed five per cent. commission on all license tax collected and accounted for by him.

§ 4196. No clerk shall issue any license except on blanks furnished to him by the Auditor of Public Accounts; nor shall any license be granted for a longer term than one year, and shall not be transferable, except as herein provided.

§ 4197. No license shall be valid nor confer any authority unless the same be issued on blanks furnished for that purpose by the Auditor of Public Accounts.

Applicants for license must state where business is proposed.

§ 4198. All applicants for license, except peddlers, shall state the county, city, town and place therein where it is proposed to carry on the business, and all licenses, except to peddlers, shall specify the place where the business is to be conducted, and no one but the person named in the license shall sell under or exercise the privilege granted; nor shall the privilege granted be exercised at any other place than that mentioned in the license, except that retail dealers in spirituous, vinous or malt liquors, in any incorporated city or town, may remove their place of business to some other place in the same city or town, by the consent of the county court and municipal authorities of such town or city, entered of record and indorsed on the license. But before making the motion for the consent for the removal, the applicant must give notice of the motion, as required, before the license is granted. But when the place is once changed, the party shall not be allowed to change the location a second time, or sell at the original place without first procuring a license. Whenever any person to whom the license has been granted, and who has paid the tax thereon, shall die, or sell his stock or place of business before the expiration of the license, the authorities by which such license was originally granted may renew the license to the personal representative or widow of the deceased, or purchaser of the stock or place of business, without the payment of any additional tax for the unexpired period. The application for the renewal and the granting thereof shall be in the same way and be subject to the same conditions as original license, except that the renewal, when granted, shall be indorsed on the license as originally granted.

§ 4199. Selling, bartering or loaning liquors in quantities of less than five gallons shall be deemed retailing.

§ 4200. All license granted by the county court shall be issued by the county clerk, for which he shall be entitled to the same fees as in cases where he is authorized to grant the license.

Penalty for doing business without license.

§ 4201. Any person who shall engage in any business, or sell or offer to sell, any article on which a license is required before procuring the license, and paying the tax thereon, as required by law, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense, unless otherwise specially provided.

§ 4202. Any county clerk who shall violate any provisions of this article shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense.

Subdivision II.

Taverns, Merchants, Distillers and Druggists.

County court to grant liquor license.

§ 4203. All licenses mentioned in this article, except licenses to sell by retail spirituous, vinous or malt liquors, shall be granted by the county clerk; and licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court; but the county court shall not grant a license to sell spirituous, vinous or malt liquors until ten days' notice shall be given by posting a written or printed notice at the door of the court-house, and at least at four public places in the neighborhood where the liquor is to be sold; and if the majority of the legal voters in the neighborhood shall protest against the application, it shall be refused. The county court in each instance shall determine what constitutes the neighborhood. Nor shall such license be granted to any person of bad character, or who does not keep an orderly, law-abiding house.

Gaming prohibited.

§ 4204. It shall be unlawful for any person to whom a license is granted, as contemplated in this subdivision, to suffer any gaming, scandalous or disorderly conduct in their houses or on their premises, or furnish any liquor to any person who is drunk, or who is a known inebriate, or who is under twenty-one years of age, or to sell any liquor on Sunday, or any other day the law may prohibit the sale

thereof; and on trial of any person by the county court on a proceeding to cancel license, the fact that a person was in a state of intoxication in a house where liquor is sold, shall be *prima facie* evidence that he was furnished liquor while drunk by the proprietor of the house.

License to merchants, druggists and distillers.

§ 4205. License to merchants, druggists or distillers shall be granted only upon satisfactory evidence that the applicant is, in good faith, a merchant, druggist or distiller, and that the applicant has not assumed the name or the business for the purpose of retailing liquors; and such license shall only authorize the person to sell the liquor named in the license in quantities not less than a quart, and to be taken off and not drunk on the premises where sold, or adjacent thereto, except druggists may retail in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician.

License to keep a tavern.

§ 4206. License to keep a tavern outside of an incorporated city or town shall be granted only to persons who are prepared with houses, bedding, stabling and provender sufficient to accommodate the public, and shall not be granted to any one unless the keeping of a tavern at the place proposed is necessary for the accommodation of the public, nor until the applicant shall take an oath, in open court, that he, in good faith, intends to keep a tavern for the accommodation of the public.

§ 4207. Every person who shall obtain a license to keep a tavern, with the privilege of retailing liquors, shall, at the time the same is granted, enter into bond, with good surety, payable to the Commonwealth, to be approved by the county court, in substance as follows:

"Whereas, A B has been granted license to keep a tavern at ——, in —— county; now we, A B, principal, and C D, his surety, do hereby covenant to and with the Commonwealth of Kentucky, that the said A B shall continually provide said tavern with good, wholesome, cleanly lodging and diet for the patrons thereof, and stabling and provender for horses and mules, during the period that the license remains in force; and that he will not suffer any gaming,

scandalous or disorderly behavior in his house, and that he will not sell or give any liquor to any person who may be drunk, or to any person who is a known inebriate, or who is under twenty-one years old. The provision as to providing stabling and provender for horses and mules shall only apply to taverns to be kept outside of an incorporated city or town, and in towns of the sixth class.

"Given under my hand this — day of ——."

Violation of license — forfeiture.

§ 4208. Any tavern-keeper who shall violate the provisions of his bond, or any tavern-keeper, merchant, distiller or druggist who shall violate any provision of this article, shall forfeit his license; and when the county attorney shall have reasonable grounds to believe, either upon his own knowledge or from the oath of two credible witnesses, of such violation, he shall notify the alleged offender to appear before the next term of the county court, commencing not later than five days next after the service of the notice, to show cause why his license should not be canceled. On the trial of the case, court shall enter an order canceling the license or acquit the defendant, as the proof may authorize.

§ 4209. Any person who shall sell any liquor after his license has been canceled, until such order be reversed or set aside, shall be deemed guilty of selling without license, and, on conviction, be punished accordingly.

Duty of county attorney.

§ 4210. The county attorney shall prosecute all cases arising under the provisions of this article; and in cases in which the license is canceled he shall be allowed a fee of ten dollars, to be taxed as cost against the defendant in each court in which the case may be tried.

Appeals.

§ 4211. An appeal may be prosecuted by the county attorney or the defendant to the circuit court from any decision of the county court under this article; but the order of the county court shall not be suspended until reversed by the circuit court. Where the appeal is taken by the county attorney, an appeal bond shall not be required.

§ 4212. In such cases, the court shall be the judge of the law and facts, and no jury shall be required.

§ 4213. Any person whose license has been canceled shall not be granted another license for twelve months thereafter.

§ 4214. License to sell liquor in quantities less than a quart, outside of an incorporated city or town, shall not be granted to any person except a licensed tavern-keeper, or to a druggist, to sell for medical purposes only, on prescription of a regular practicing physician.

Subdivision III.

Peddlers.

Peddlers.

§ 4215. All persons who are by this article deemed peddlers shall, before the sale or attempted sale of any article or right, as herein contemplated, procure and pay for license, as required by law; and any peddler who shall violate the provisions of this section shall be deemed guilty of peddling without license, and punished accordingly.

Who are peddlers.

§ 4216. All itinerant persons vending lightning-rods, patent rights or territory for the sale, use or manufacture of patent rights, goods, wares, merchandise, clocks, watches, jewelry, gold, silver or plated ware, spectacles, drugs, nostrums, perfumery, and any other thing not hereinafter specially exempt, shall be deemed peddlers.

§ 4217. All persons who shall, under cover of *bona fide* merchants, take up a temporary residence in any county, city or town of this Commonwealth, for the purpose of disposing of goods, wares or merchandise, either at auction or otherwise, except as hereinafter specially provided, shall also be deemed peddlers.

Exceptions.

§ 4218. No persons shall be deemed peddlers under sections two and three of this article, for selling agricultural implements, sewing machines, portable mills, books, pamphlets, papers, meat, stone-ware, or farm or garden products, nor merchants nor their agents for selling by sample.

Exclusive jurisdiction in county courts.

§ 4219. County courts shall have exclusive jurisdiction to grant peddlers' license. Before any such license shall be granted, the applicant shall prove in open court, by at least

two credible witnesses, that the applicant is a person of good moral character, which fact, when so proven, shall, with the name, age, weight, height, color of hair and eyes of the applicant, be entered of record; and thereupon the court shall, by its order, direct the clerk, on the payment of fees and cost, to issue the license and affix his official seal thereto, and on the back of which he shall write the description of the person to whom the license is granted, as contained in the order, and shall attest the same.

Duty of peddler before he peddles in another county

§ 4220. Before peddling in any other county than that in which the license is granted, the peddler shall present his license to the county clerk of such other county, who, upon being satisfied of its genuineness, shall indorse the word "genuine," and affix his official signature. A failure to have the license indorsed "genuine" by the clerk, before selling or offering to sell, or the failure to exhibit the license for inspection by an officer authorized to do so when demanded, shall subject the peddler to the same penalty as though he had peddled without license. For examining the license and making the indorsement, the clerk shall be entitled to a fee of twenty-five cents.

License limited to one person.

§ 4221. No peddler's license shall give authority to more than one person to peddle under it. Nor shall any person to whom it is granted sell by an agent or clerk, or in any other way than his own proper person. But all agents or clerks shall procure separate license.

§ 4222. All peace officers, county judges and county attorneys are given authority to demand of all persons peddling, or assisting a peddler, the production of their license for examination.

"Peddler's note."

§ 4223. All notes given for articles or rights sold by a peddler shall have written or printed across the face the words "Peddler's Note." To such notes all defense may be made as against the original holder, whether the same be placed upon the footing of a bill of exchange or not; and all contracts for articles or rights sold by a peddler without license, and all notes given for such articles or rights not having the indorsement across the face, as hereinbefore provided, shall be null and void.

Subdivision IV.

Amount of License Tax.

License tax. § 4224. Before engaging in any occupation or selling any article named in this and section thirty-seven of this article, the person desiring to do so shall procure license and pay the tax thereon as follows:

To keep a tavern, ten dollars.

To keep a tavern with the privilege of selling malt liquors, fifty dollars.

To keep a tavern with the privilege of retailing spirituous and vinous liquors, one hundred dollars.

To keep a tavern with the privilege of retailing spirituous, vinous and malt liquors, one hundred and fifty dollars.

To retail malt liquors, fifty dollars.

To retail spirituous and vinous liquors, one hundred dollars.

To retail spirituous, vinous and malt liquors, one hundred and fifty dollars.

To persons who are distillers of spirituous liquors in good faith, to retail spirituous liquors of their own manufacture at their distillery or residence, but shall only sell at one of said places, and that must be named and designated in the license, in quantities of not less than one quart, the liquor not to be drunk on the premises, or adjacent thereto, seventy-five dollars.

To persons who are manufacturers of vinous liqours in good faith, and distillers of peach and apple brandy, to retail liquors of their own manufacture at the place of manufacture or distillery, in quantities not less than a quart, and not to be drunk on the premises, or adjacent thereto, twenty-five dollars.

To persons who are merchants in good faith, engaged in carrying on a *bona fide* mercantile business other than the sale of liquors by retail, to retail spirituous liquors at their store-houses in quantities not less than a quart, the liquor

not to be drunk on the premises, or adjacent thereto, seventy-five dollars.

To persons who are druggists in good faith, to retail spirituous and vinous liquors at the drug-store in quantities not less than a quart, the liquor not to be drunk on the premises, or adjacent thereto, and to sell in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician, fifty dollars.

To sell playing cards, five dollars.

To sell pistols, twenty-five dollars.

To sell bowie-knives, dirks, brass-knucks or slung-shots, fifty dollars.

To keep a room or saloon in which billiards, pigeon-hole or pool-tables are kept, for the use of which a price is charged, thirty dollars for the first table, and twenty dollars for each additional table.

To engage in the business of a pawnbroker, three hundred dollars.

To the keeper of a nine or ten-pin or bowling alley, for the use of which a price is charged, forty dollars, if the population of the county exceeds ten thousand; if under that number, twenty dollars, and the same rate for each alley or ball-way.

Circuses, menageries or other exhibitions displayed under canvas, one dollar for each one hundred voters of the county in which the exhibition is given, and the same amount for each separate exhibition to which an admission fee is charged; but the whole amount of the tax shall not exceed fifty dollars for each exhibition; and each side-show, when a separate fee is charged, shall pay tax as a separate show.

The exhibition solely of trained or educated animals per day, where an admission fee is charged, five dollars.

To stand a stud-horse, jack or bull, a sum equal to the greatest sum charged for the service of the animal, whether the same be for the season or for insurance. The license for breeding stock shall expire on the thirty-first day of December after it is granted. The applicant for such license shall state, on oath, the largest amount he intends to charge,

directly or indirectly, for the service of the animal, and if in property or other thing, the value thereof. If any such animal be purchased or brought into the State, or from one county to another by a citizen of this State, between the first day of July and the first day of December in any year, the tax on the license until December thirty-first, after the purchase or removal, shall be in proportion to the annual tax as the time for which the license has to run bears to the whole year. All persons making application for such reduced license shall make and file with the clerk an affidavit, stating when such animal was brought into the State or another county, and the name of the owner or owners, and their place of residence.

§ 4225. Peddlers of articles on which a license tax is required by law shall pay the following license for peddling in the entire State, except as hereinafter provided:

One person with two-horse wagon, fifty dollars.

One person with one-horse wagon, forty dollars.

One person on horseback, thirty dollars.

One person on foot, or each person who may accompany a peddler with a wagon, twenty dollars.

To peddle in one county in this State, one-fourth of the tax required for the entire State.

The license tax of peddlers of lightning rods or venders of patent rights or territory for the sale or manufacture of patent rights or articles, shall be twice the amount of other license tax as provided in this section.

Article XI.

Tax on Organization of Corporations and License tax of Certain Foreign Corporations.

Corporation tax.

§ 4226. Every corporation which may be incorporated by or under the laws of this State, having a capital stock divided into shares, shall pay into the State Treasury one-tenth of one per centum upon the amount of capital stock which such corporation is authorized to have, and a like tax upon any subsequent increase thereof. Such tax shall be

due and payable on the incorporation of the company and on the increase of the capital thereof, and no such corporation shall have or exercise any corporate powers until the tax shall have been paid; and upon payment, they shall file a statement thereof with the Secretary of State.

Insurance company.

§ 4227. Every life insurance company, other than assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall, on the thirty-first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the Insurance Department, a statement, under oath, of all premiums received in cash or otherwise in this State, on business done in this State during the year ending on the thirtieth day of June last preceding, or since the last returns were made, and shall, at the same time, pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained, and upon payment, file a statement thereof with the Secretary of State.

Building and loan associations.

§ 4228. Every foreign building and loan association or company doing business in this State, on or before the first day of July in each year, shall pay into the State Treasury two dollars on every one hundred dollars of the gross receipts of such company or association on business done in this State during twelve months next preceding the first day of June of the year the said amount is required to be paid, and, upon payment, file a statement thereof with the Secretary of State.

Failing to comply guilty of misdemeanor.

§ 4229. Any corporation, company or association failing to comply with the two preceding sections shall be deemed guilty of a misdemeanor, and, on conviction, be fined fifty dollars for each day the amount therein required is not paid after the same becomes due.

Insurance companies to report to Auditor.

§ 4230. Every insurance company, other than life insurance companies and assessment casualty companies, not organized under the laws of this State, but doing business therein, shall, on the first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the Insurance Department,

a statement, under oath, of all premiums received in this State, or out of this State, on business done in this State during the year ending on the thirtieth day of June last preceding or since the last returns were made, and shall give the name and location of, and the amount of premiums received by, each agent, and losses paid at each agency, and shall, at the same time, pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums so ascertained, less returned premiums on canceled policies and reinsurance in companies having authority to transact business in this State, and upon payment file a statement thereof with the Secretary of State.

Assessment, life and casualty companies to report.

§ 4231. Every assessment, life or casualty insurance company or association not organized under the laws of this State, but doing business therein, shall, on the first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in Insurance Department, a statement, under oath, of all premiums or annual dues and assessment received, in cash or otherwise, in this State or out of this State, on business done in this State during the year ending on the thirtieth day of June last preceding, or since the last returns were made; and shall at the same time pay into the Treasury of this State a tax of one dollar on each one hundred dollars of premiums or annual dues and assessments so ascertained, and upon payment file a statement thereof with the Secretary of State.

Penalty for refusing.

§ 4232. Any insurance company failing or refusing for thirty days to return the statements required, under the oath of some principal officer or general agent or manager of the State, and to pay the tax herein required, shall forfeit one hundred dollars for such offense, and it shall be the duty of the Insurance Commissioner to revoke the authority, to such company or its agents, and to publish such revocation in some newspaper of this Commonwealth.

Duty of foreign building and loan associations.

§ 4233. It shall be the duty of every foreign building and loan association doing business in this State, or some officer, manager, general or State agent of the same, to return to the

Auditor of Public Accounts, for deposit in the Insurance Department, on or before the first day of July of each year, a correct statement, under oath, of all receipts on business done in this State during the twelve months next preceding the first day of June of the same year the statement is required.

Penalty.

§ 4234. Any company or association, as contemplated in the preceding sections, failing or refusing to return the statement or pay the taxes as herein required, shall be deemed guilty of a misdemeanor, and, on conviction, be fined one thousand dollars for each offense.

False statement—how punished.

§ 4235. If any officer of any of the companies or associations mentioned in this article shall make any false statement in any report herein required, he shall be deemed guilty of perjury, and, on conviction, be punished accordingly.

§ 4236. The Franklin Circuit Court shall have jurisdiction of all prosecutions under this article.

Auditor may sell.

§ 4237. The Auditor of Public Accounts may, by action, sue for and recover, in the name of the Commonwealth of Kentucky, all taxes due the State under this article, and the Franklin Circuit Court shall have jurisdiction of such action.

Article XII.

Tax on Law Process.

Tax on law process.

§ 4238. On each original action or proceeding commencing with or without original process, when the amount in controversy, exclusive of interest and cost, exceeds fifty dollars; on each appeal to the circuit or quarterly court; on each traverse of forcible entry or detainer; on each proceeding to revive a judgment; on each deed or power of attorney to convey real or personal estate, or any mortgage or conveyance of real or personal property, or lien or conveyance of coal, oil, gas or other mineral right or privilege (but no tax shall be paid on any chattel mortgage unless the amount exceeds fifty dollars), and on each marriage license, fifty

cents; on each appeal to the Court of Appeals, one dollar; on each verdict of a petit jury in the circuit court, four dollars. The tax shall be paid when the parties withdraw a jury or the plaintiff sustains a non-suit after the jury is sworn. On filing and registering a plat and certificate of survey, and issuing and recording patent thereon, one charge, which shall be paid before survey is filed, but not to apply to a survey heretofore filed in Register's Office; two dollars and fifty cents for each survey consisting of ten acres or less, and five dollars for each survey in excess of ten acres; for filing a caveat, twenty-five cents; for filing a copy of judgment of a court in cases of a caveat, mandamus or other proceeding affecting the Land Office, or the duties of the Register, twenty-five cents; for issuing a land-warrant, one dollar; for each official certificate of a patent or survey, with seal of office affixed, one dollar; for copy of a plat, fifty cents; for a copy of courses and distances of any patent or survey, fifty cents; for copy of an entry or land-warrant, fifty cents; for copy of an assignment, twenty-five cents; for copy of a caveat, two cents for every twenty words; for copy of any writing not specifically provided for, two cents for every twenty words.

Article XIII.

Duties of Clerks and other Officers in Relation to the Revenue.

Duty of county clerk as to tax-books.

§ 4239. The clerk of the county court, after the examination and approval of the tax-books by the board of supervisors, shall test the accuracy of the extensions and additions on said book, make additions of each column, recapitulate blanks to be furnished by the Auditor, the footing of each page to show the aggregate amount, value and number of each column in said tax-book, and record said recapitulation sheet or sheets in said book, with his official certificate attached, and see that said extensions, additions, footings and recapitulations are correct. He shall annually make out for the use of the sheriff or collector, in a book, a correct list of all tithes and taxable property as assessed and super-

Recapitulation book.

vised, and shall deliver the same to the sheriff or collector on or before the first day of March, and take his receipt therefor, and at the same time he shall transmit, by mail or otherwise, to the Auditor of Public Accounts, on said blanks, to be furnished by the Auditor, a certified copy of said recapitulation sheet or sheets, showing the aggregate amount, value and number of each kind of enumerated property, as shown by the tax-books, whether the same be assessed for taxation or statistics. For testing the accuracy of the extensions and additions on said book, and making additions of each column, and for making out said tax lists for the sheriff, the county clerk shall be allowed annually, out of the State Treasury, two cents for each line across the page of said book, made out for the sheriff, including the name of the tax payer and number of total values. The clerk shall present his account to the county court, verified by his affidavit, which shall be approved and allowed by the court, if found correct, and be duly certified to the Auditor, who shall draw his warrant on the Treasurer for the amount. And for making out said recapitulation sheet and recording same in the tax-book said clerk shall receive two cents for each line across the page thereof, including the last number of total values; and the same compensation for copying and certifying said recapitulation sheet to the Auditor, to be ascertained by the Auditor and paid by the treasurer on the warrant of the Auditor.

Clerk to certify to assessor—when.

Transfers to assessor.

§ 4240. The clerk shall, on or before the fifteenth of September of each year, make and certify to the assessor a complete statement of all conveyances made during the preceding year by justices' districts, showing the names of the parties, the date of conveyance, and the consideration of the conveyance; for which service he shall be allowed at the rate of five cents for each conveyance, payable out of the State Treasury, on the certificate of the county clerk, verified and allowed by the county court, as provided in the preceding section, which statement shall be returned by the assessor with his tax-book and schedule to the county clerk for the use of the board of supervisors.

Sheriff or Auditor's Agent to list property omitted—how.

Additional list.

§ 4241. It shall be the duty of the sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or Railroad Commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five days after the filing of such statement, the clerk of the court shall issue a summons against the owner to show cause before the next regular term of county court, which does not commence within five days after service of such summons, to show cause before said court why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the

amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per cent. on the amount of the taxes due and cost of assessment. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected.

County clerk to report.

§ 4242. Each circuit and county clerk shall make out an account of all taxes and other public money received by him up to the first day of each circuit court, and said report shall show in detail of whom said moneys were received, for what and when received, and shall be verified by him and entered of record: and he shall pay over to the trustee of the jury fund, until otherwise provided by law, so much thereof as the court may by order direct as being necessary for the payment of the jurors, and the original account certified, with the order of court, shall be transmitted with the balance of the fund to the Auditor. The clerk shall be allowed five per cent. commission on said sums reported and paid by him. If any clerk shall fail to perform the duties required of him in this section, he shall be liable on his official bond, with twenty per cent. damages thereon, which may be recovered by action in the name of the Commonwealth in any court of competent jurisdiction.

Clerks instructed to keep books.

§ 4243. The clerks of the circuit and county courts and trustees of the jury fund of this Commonwealth shall keep a well bound book in their offices, in which they shall enter at the time it is receivable, or when received, all taxes on suits or other moneys received by them for the Commonwealth, showing of whom received, on what account, amount and date; which book shall, at all times, be open to public inspection.

Clerks to issue executions—when.

§ 4244. It shall be the duty of the clerks of the circuit courts to issue executions and place them in the hands of the sheriff, within twenty days after adjournment of each

term of their respective courts, upon all jury fees which remain unpaid; and, upon failure to do so, shall be held responsible on their official bonds for the amount of such jury fees upon which they had failed to so issue executions.

Process on all judgments in favor of Commonwealth to be issued.

§ 4245. It shall be the duty of the circuit court clerks of this Commonwealth to issue proper process, and place the same in the hands of the sheriff, taking his receipt therefor, within ten days after the adjournment of each term of court, on all judgments in favor of the Commonwealth which have not been paid or replevied in the office, or remitted or respited by the Governor; and shall, within ten days after the maturity of each and every replevin bond on any such judgment, issue execution and place it in the hands of the sheriff as aforesaid; and upon any such execution issued upon any such replevin bond being returned by the sheriff without making the money, he shall reissue execution from time to time, at least once in every ten months for five years, and as often thereafter as demanded by the Commonwealth's or county attorney or sheriff, and place in the hands of the sheriff as aforesaid; and upon all such judgments, executions or *capias pro fine*, which may be stayed or respited by the Governor the clerk shall issue proper process and place it in the hands of the sheriff, as aforesaid, within ten days after the expiration of such stay or respite. And it shall also be the duty of the circuit court clerks to make out and forward to the Auditor, some time in the month of June in each year, a full and complete list of all unpaid judgments as aforesaid, showing at what date execution or other process issued, to whom delivered, what return has been made, and the date thereof; and upon failure to discharge his duty as required in this section, the clerk so failing shall be held responsible on his official bond for the amount of the judgment, interest and cost to which such failure is applicable; but nothing in this section shall be construed to authorize the Governor to remit any judgment unless the same be for a fine imposed as a punishment.

Clerks to report to Auditor.

§ 4246. It shall be the duty of the clerks of the circuit courts to report to the Auditor, at the same time that he

makes the report required in the preceding sections, a list of all such judgments, executions, et cetera, named in the said preceding sections, which have been paid in court, or as appears from returns or other entries upon his books, or returns of execution or other process, have been collected since last report, by whom and from whom collected, amount and date.

§ 4247. It shall be the duty of the circuit court clerks to forward to the Auditor, within ten days after the adjournment of each term of court, a list of persons who have been ordered by the court to pay money to the sheriff, showing on what account and amount.

Penalty for failure.

§ 4248. Upon failure or neglect to perform any duty required by this article, the officer so failing shall, for each offense, be fined not less than fifty nor more than one hundred dollars, in the discretion of the court. Upon failure of any circuit or county court clerk to make and forward to the Auditor the reports required by this article, he shall be fined not less than two hundred nor more than three hundred dollars for each offense, which may be recovered by motion, action, or indictment in the Franklin Circuit Court.

Certain officers to report tax collected.

§ 4249. The Clerk of the Court of Appeals, Register of the Land Office and Secretary of State, shall, in the month of June and December of each year, report, under oath, to, and settle with, the Auditor for tax and public money which shall come to their hands, and pay the amount due from them into the State Treasury, and upon payment file a statement thereof with the Secretary of State. For each violation of this section, said officers may be fined in the Franklin Circuit Court, on motion or action in the name of the Commonwealth, not exceeding one hundred dollars, and shall be liable in the same manner to judgment and twenty per cent. damages for all public money and tax due from them.

Persons erroneously charged—how released.

§ 4250. Any person or corporation claiming to be erroneously charged with any tax upon property not owned by them, may, at any time not later than the next regular county court after they have received notice of the same, by

demand being made upon them to pay the tax, offer evidence in support of said complaint to the county court of the county in which the assessment was made; and if said court, after due consideration of the evidence, finds that they were not the owner of the property assessed, it may correct the same by releasing them from the payment of the tax thereon; and it shall be the duty of the court to have the property immediately listed as against the rightful owner thereof. County courts shall have further authority, after giving notice to the sheriff and assessor, to correct any mere clerical errors in the assessment, and any correction made without such notice shall be void. The right of appeal from the decision of the court as herein provided shall apply to all final orders of court made under this section; and it shall be the duty of said court to certify its action to the Auditor of Public Accounts and sheriff, as provided in said preceding section.

Fiscal court.

§ 4251. The fiscal courts, before allowing and certifying any delinquent list, upon the application of the sheriff, shall administer to the sheriff and his deputies the following oath: "You do swear that this list of insolvents and delinquents, now before the court, and returned by you, is just and true, as you believe according to the knowledge which you have, and that you have been to the residence (if in the county) of the party from whom the tax is due, and that you can not find any property liable to sale for taxes, and that you will true answers make to all questions asked you touching said lists, and the efforts made by you to collect the amount thereof." The court shall then proceed to examine the sheriff to ascertain the truth of the facts, and upon such answers, and other evidence, and their own knowledge, to allow such portions of the lists as may be right, which, being certified as allowed, shall entitle the sheriff to a credit in his official settlement.

ARTICLE XIV.

Reports of Officers.

Officers to report.

§ 4252. It shall be the duty of all sheriffs, clerks, county judges, police judges, justices of the peace, constables, marshals and other officers authorized to receive moneys due the Commonwealth, to report on the first day of each circuit court, and in a court having a continuous session to report every four months, the amount of all moneys due the Commonwealth and collected by any such officer from all sources except State and district taxes, since such officer's last report was made. The report shall be in writing, and sworn to in open court by the officer making it, unless for good cause the court may excuse an officer and receive his report sworn to before some person authorized to administer an oath. The reports shall be on blanks, prepared and furnished the circuit clerk by the Auditor of Public Accounts, and shall show from whom the money was received, the amount, and the date of collection, and on what account the money was paid. The county clerk shall, in addition to the facts as above required, show, by his report, all licenses granted by him and the county court since his last report, the name of the person to whom granted, and the date of each, the date of expiration and the amount of tax on each. The county judges, police judges and justices of the peace, and all other courts inferior to the circuit court, having jurisdiction to render judgments in favor of the Commonwealth shall, in addition to the facts required to be shown by them, report all unsatisfied judgments in their respective courts, rendered in favor of the Commonwealth during twelve months next before the time when such report is required to be made, the name and residence of the person against whom such judgment was rendered, the date of the judgment and the amount thereof, and the reason why such judgments have not been collected.

Court may require additional information.

§ 4253. In addition to the facts required to be reported in writing, the court may require any such officer to be

sworn and answer concerning any matter pertaining to the interest of the Commonwealth; and the court may make such orders with reference to information thus obtained to protect the interest of the Commonwealth as it may deem proper, and enforce obedience thereto by appropriate proceedings. The report shall be delivered to the grand jury for their examination, and returned to the clerk of the circuit court.

Penalty for failing to report.

§ 4254. Any officer failing to make the report, and failing to comply with the order of the court with reference thereto, shall be deemed guilty of contempt of court, and be proceeded against by proper rules and orders.

§ 4255. The court shall order all such officers to pay any money in their hands to the officers entitled to receive it, and when the amount due is paid and the receipts therefor filed with their respective reports, the court shall approve the reports, and cause the same to be filed in the office of the clerk of his court.

§ 4256. Courts having a continuous session shall, by order, fix a day in every four months for receiving the report of all such officers, on which day all the reports shall be made, and proceedings had, as on the first day of the term of other courts.

Duty of court.

§ 4257. Each circuit judge shall cause a complete summary of the several reports to be made and signed by him, and transmitted to the Auditor of Public Accounts within three weeks after said reports are made and filed, and the Auditor of Public Accounts shall not draw his warrant on the Treasurer of this State for the monthly salary of any circuit judge until the reports above required are filed, or proper steps have been taken by the court against delinquents to compel them to discharge their duties as herein contemplated.

Article XV.

Revenue Agent.

Auditor may appoint agent.

§ 4258. The Auditor of Public Accounts may appoint an agent in each county of this Commonwealth. The agent shall hold his office and be removed at the pleasure of the Auditor.

§ 4259. Before entering upon the discharge of the duties of office, such agent shall take the oath required of other officers, and shall execute a bond to the Commonwealth of Kentucky, with good security, to be approved by the Auditor, conditioned that he will faithfully discharge the duties of his office. The bond shall be filed and safely kept in the Auditor's office, and upon which the agent and his sureties shall be jointly and severally liable for a breach thereof to the Commonwealth or any person in interest. The bond shall be renewed every two years, or as often as the Auditor may require.

Duty of agent.

§ 4260. It shall be the duty of the agent to cause to be listed for taxation, in the manner required by law, all property in the county for which he may be appointed which may have been omitted to be assessed by the assessor, board of supervisors, board of valuation and assessment or Railroad Commission.

Agent to report.

§ 4261. He shall report to the Commonwealth's attorney, county attorney or grand jury all persons who may be guilty of violating the laws governing license taxes, and shall cause such offenders to be prosecuted; and in all such cases where the person so reported or prosecuted shall be granted license, and shall pay the tax and penalty of twenty per cent., as imposed by law, the agent who reports the offender, or who causes payment of such license and penalty, shall be entitled to receive such penalty of twenty per cent. as compensation for his services.

Right to investigate accounts and records.

§ 4262. It shall be the duty of the agent, and he shall have the right, to investigate the accounts and records of all officers whose duty it may be to receive or collect money

due the State or county, and report to the Auditor, from time to time, all delinquent officers, and the amounts collected by them which they have failed to pay into the Treasury of the State or the county, or which they have failed to collect and account for. He shall report all excessive charges made by any such officers, and also those who have received or retained a greater sum for their services, or the services of their deputies, than is allowed by law, and all such other facts by which the State is being unlawfully deprived of any money, and any other facts touching the interest of the Commonwealth as he may deem important, or of which the Auditor may require information.

May institute suit—when.

§ 4263. It shall be the duty of the agent, and he shall have authority, when directed by the Auditor, to institute suit, motions or proceedings, in the name of the Commonwealth against any delinquent officer or other persons to recover any money which may be due the Commonwealth; and in all such suits, motions or proceedings in which a judgment is recovered, the party in default shall, in addition to the amount for which he is liable to the State, be adjudged to pay a penalty of twenty per cent. on the amount due; and the agent who prosecutes such action, and recovers the amount due the Commonwealth, shall be entitled to receive said penalty for his services. The penalties herein provided for shall not be in addition to the penalties in actions in the name of the Commonwealth prosecuted by the county attorney or other attorneys for the Commonwealth.

Duty of agent as to money collected.

§ 4264. The agent, within five days after collecting any money due the Commonwealth, shall pay the same into the State Treasury, and, upon payment, file a statement thereof with the Secretary of State. Any agent failing to comply with this section shall forfeit the penalty due him for his services, and be deemed guilty of a misdemeanor, and, on conviction, be fined a sum equal to twice the amount he should have paid over.

§ 4265. The agent shall, on the first day of January of each year, and whenever required by the Auditor or State Inspector, file with the Auditor and Secretary of State an itemized statement of the money which he may have received as such agent, and from whom collected, and the date of collection. Agent to report.

§ 4266. The Commonwealth shall not be liable for, or pay any cost of any action or proceeding instituted by any agent, nor shall it be liable for or pay any sum to an agent for any services as such, except out of amounts which may be collected as penalties in cases prosecuted by the agent.

§ 4267. All acts and part of acts in conflict with this act are hereby repealed, except an act, entitled "An act to provide additional funds for the ordinary expenses of the State government," approved June four, one thousand eight hundred and ninety-two, and also except an act amendatory thereof, approved July six, one thousand eight hundred and ninety-two. (These acts excepted were temporary only.) Repealing clause.

Article XVI.

§ 4268. The first assessment made under this act and the collection of taxes thereunder for the year one thousand eight hundred and ninety-three shall differ from those thereafter made, and in the following particulars: In the year one thousand eight hundred and ninety-two the assessor shall commence the duties of his office on the fifteenth day of November; and all taxable estate to be listed with the assessor shall be assessed and valued as of the fifteenth of November, one thousand eight hundred and ninety-two, and the person owning or possessing the same on that date shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same. Persons so listing their estates with the assessor, as provided in section fourteen of article two of this act, shall state the value thereof on the fifteenth day of November, one thousand eight hundred and ninety-two. Exception.

§ 4269. In administering oath to every person listing property in the year one thousand eight hundred and ninety-two, the assessor or his deputies shall administer the oath provided for in section five of article two of this act, so modified, that the words "fifteenth day of September" shall be stricken out, and the words "fifteenth day of November," inserted in lieu thereof.

§ 4270. On or before the first day of November, one thousand eight hundred and ninety-two, the Auditor of Public Accounts shall deliver to each county clerk of this State, for the use of the assessors and their assistants, a sufficient number of assessment books and necessary blank schedules for the assessment of all property, real and personal, with interrogatories to be propounded to each person, with affidavit thereto attached, to be signed and sworn to by the party whose property is assessed, which blank and schedules, interrogatories and affidavits shall be as provided in section sixteen of article two of this act, except that the word "November" shall be substituted for the word "September" whenever it occurs therein.

§ 4271. The assessor shall complete his work and return the tax-books and schedules to the county clerk on or before the fifteenth day of February, one thousand eight hundred and ninety-three; and if the tax-books be not returned by the assessor by said time, the county clerk shall copy and deliver to the sheriff the tax-books of the previous year by the first of April, one thousand eight hundred and ninety-three.

§ 4272. The reports and statements required to be made by corporations, companies, or associations under sections two, three and four, of article three of this act, shall be made in the year one thousand eight hundred and ninety-two, between the fifteenth day of November and the fifteenth day of December, and the information therein required shall be given as of November fifteenth, and for twelve months prior thereto, instead of September fifteenth, one thousand eight hundred and ninety-two.

§ 4273. The penalties mentioned in section eleven of article three of this act shall not attach in the year one thousand eight hundred and ninety-two until December fifteenth.

§ 4274. The reports required to be made by the owners or proprietors of distillery bonded warehouses under section one of article five of this act, between September fifteenth and October first of each year, shall be made for the year one thousand eight hundred and ninety-two between November fifteenth and December first, and such reports shall show the quality and kind of spirits in such warehouses on the fifteenth day of November, one thousand eight hundred and ninety-two.

§ 4275. In the year one thousand eight hundred and ninety-three, the supervisors shall convene at the county seat of their respective counties on the first Monday of March; and they shall return the tax-book with their certificate of examination and approval, and with the record of their proceedings, to the county clerk within twenty days after their said time of meeting.

§ 4276. In the year one thousand eight hundred and ninety-three the sheriff or his deputies shall make his visits for receiving taxes, as provided in section fourteen of article seven of this act, at least once every ninety days, between June first and December first.

§ 4277. The clerk of the county court shall, in like manner, as provided in section one of article thirteen of this act, make out for the use of the sheriff or collector, in a book, a correct list of all tithes and taxable property as assessed and supervised, and shall deliver the same to the sheriff or collector on or before the first day of June, one thousand eight hundred and ninety-three, and take his receipt therefor, and at the same time transmit, by mail or otherwise, to the Auditor of Public Accounts, on blanks to be furnished by the Auditor, a certified copy of the recapitulation sheet or sheets, showing the aggregate amount, value and number of each kind of enumerated property, as shown by the tax-book, whether the same be assessed for taxation or statistics.

§ 4278. The clerk shall, on or before the fifteenth of November, one thousand eight hundred and ninety-two, make and certify to the assessor a complete statement of all conveyances made during the preceding year, as provided in section two, article thirteen, of this act.

CONCLUSION.

§ 4279. All acts and parts of acts in conflict with this act are hereby repealed, except an act, entitled "An act to provide additional funds for the ordinary expenses of the State government," approved June four, one thousand eight hundred and ninety-two, and also except an act amendatory thereof, approved July six, one thousand eight hundred and ninety-two.

§ 4280. An emergency is declared to exist, for the reason this act requires property to be listed and assessed for taxation which heretofore has escaped taxation; and the depleted condition of the State Treasury requires that all property should be taxed; therefore, this act shall become a law upon the approval by the Governor.

Auditor—duties of.

§ 4281. It shall be the duty of the Auditor to make in each assessor's book a certificate of the rate of deduction or addition determined by the State Board of Equalization in the county to which such books shall pertain. The Auditor shall make out, over his hand and official seal, a certificate of the action of the Board of Equalization, which shall be transmitted to the county clerk, and by him affixed to the assessor's book for the said year, and shall be the warrant of authority to the sheriff or collector for the collection of taxes as therein set forth.

these facts and have never been so kept and cannot be so kept.

And for the same reason it is impossible to give the entire gross or net income or earnings received by said copartnership on business done in this State or elsewhere for the same length of time.

STATE OF KENTTCKY, } *sct:*
Jefferson County, }

The affidavit of J. W. Graham says that he is the chief officer of the Adams Express Company in the State of Kentucky, and that he believes the statements contained in the foregoing report are true.

(Signed) J. W. GRAHAM.

Subscribed and sworn to before me by said J. W. Graham this

(Signed) JOHN P. CASSILLY,
Notary Public, Jefferson County, Kentucky.

A copy.
Attest: J. H. STONE, *Auditor.*

Name of route.	From—	To—	No. miles.
Lou., Cin. & Lex	Newport	Lou	109
" " "	La Grange	Lexington	67
N. N. & M. V.	Anchorage	Bloomfield	45
Cin. & S. E.	Lex	Catlettsburg	129
Ohio & Big Sandy	Johnson	Hillsboro	17
Ky. Central	Ashland	Richardson	50
"	Covington	Livingston	155
"	Maysville	Paris	50
Lou. & Nash	Richmond	Rowland	34
" "	Lou	Guthrie	164
" "	B. Green	State Line	50
" "	Leb. Junction	Jellico	171
" "	B'town Jct.	Springfield	37
" "	Lebanon	Greensburg	31
" "	East Lou.	So. Lou	4
" "	Corbin	Cumb. Gap	48
Ky. Union	Glas. Jct.	Glasgow	10
Ches. & Nash	Lex	Jackson	94
Ches. & Ohio	State Line	Scottsville	11
O'boro & Falls of Rough	Cov	Ashland	145
Q. & C.	O'boro	Horse Branch	41
"	Ludlow	State Line	197
"	Lou.	Lex	87
Ky. Midland	Lawrenceburg	Burgin	26
R., N., I. & B.	Frankfort	Paris	40
Ohio River Stage R'te	Versailles	Irvine	61
" " "	Preston	Owingsville	5
" " "	Sparta	Owenton	14
" " "	Worthville	Carrollton	9
	Eminence	New Castle	4

The total length of the entire line over which the Adams Express Company forwards its matter is not fixed, but is constantly varying. The entire length of the lines over which it forwarded its matter on September 30, 1893, approximates 25,000 miles, and this is as near as J. W. Graham, who makes this statement, or the company can give the total length.

It is impossible for the Adams Express Company to state even approximately the gross or net income or earnings received by it in this State or out of this State on business done in this State for the twelve months next before September 30, 1893, as the accounts are not so kept as to show

said copartnership on September 30, 1893, was thirty-six thousand six hundred and fourteen dollars and fifty-three cents ($36,614.53). The tangible property of aforesaid is situated and assessed in sixty-eight (68) counties in this State, as follows, to wit:

Campbell,	Carter,	Bourbon,	Breathitt,
Bracken,	Rowan,	Nicholas,	Madison,
Mason,	Bath,	Fleming,	Garrard,
Lewis,	Montgomery,	Powell,	Pendleton,
Greenup,	Clark,	Wolf,	Harrison,
Boyd,	Fayette,	Lee,	Scott,
Jessamine,	Gallatin,	Nelson,	Rockcastle,
Woodford,	Owen,	Washington,	Laurel,
Jefferson,	Shelby,	Marion,	Whitely,
Oldham,	Franklin,	Taylor,	Knox,
Henry,	Anderson,	Green,	Bell,
Carroll,	Spencer,	Boyle,	Lawrence,
Boone,	Bullitt,	Lincoln,	Hardin,
Hart,	Meade,	McCracken,	Barren,
Breckinridge,	Mercer,	Warren,	Hancock,
Simpson,	Daviess,	Allen,	Henderson,
Logan,	Union,	Todd,	Crittenden,

and is of the description as follows, to wit:

Horses, wagons, harness, safes, office fixtures, &c., &c., the assessed value of which in said sixty-eight (68) counties aggregates the said sum of thirty-six thousand six hundred and fourteen dollars and fifty-three cents ($36,614.53).

The fair cash value of said tangible property at the prices it would bring at a fair voluntary sale is as follows, to wit: Thirty-six thousand six hundred and fourteen dollars and fifty-three cents ($36,614.53).

The Adams Express Company owns no lines, operates no lines, leases nor controls no lines in the State of Kentucky, but it does have a contract with the following railroads, who forward its express matter within the State of Kentucky, to the extent as follows, to wit:

APPENDIX B.

REPORT OF THE ADAMS EXPRESS COMPANY.

SEPTEMBER 30, 1893.

To the Auditor of Public Accounts of Kentucky:

The Adams Express Company, protesting against the right of the auditor or the assessing board of the State of Kentucky to call on it for the report, states that it is not a corporation, but that it is a copartnership, with its principal place of business in the city of New York. The name of the officer making this report is J. W. Graham, superintendent.

The kind of business in which said copartnership is engaged is the express business.

The amount of the capital of the said copartnership as of date September 30, 1893, is $12,000,000, divided into 120,000 shares. It has no stock, either common or preferred.

The highest price at which any of the shares above mentioned were sold at a *bona fide* sale within twelve months next preceding September 30, 1893, is $160 per share.

J. W. Graham, the officer making this report, says he has no knowledge or information as to the surplus or undivided profits of said copartnership.

The copartnership owes no debt and owed none on the 30th of September, 1893.

The fiscal year of the company ends December 31, and the accounts are not made up until the month of February of the following year, this time to give the information called for as to gross or net earnings or income therefrom or from any other source for the twelve months prior to September 30, 1893.

The amount of tangible property owned in this State by

166-150

Office Supreme Court, U. S.
FILED
DEC 14 1896
JAMES H. McKENNEY,
CLERK.

166-150 462

Supreme Court of the United States.

HENDERSON BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

JAMES P. HELM,
HELM BRUCE,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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IN THE

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendant in error on pages 28 and 29 of his brief draws a comparison between the tax burdens of "a citizen of Kentucky having the qualifications of an elector" and the "Henderson Bridge Company," with the result that while the tax burden is about the same the income from the property of the Henderson Bridge Company is shown to be $217,072.21, while on the same amount of capital the citizen, "if ordinarily fortunate," would have an income of $75,744.65.

The true situation may be thus described: Let it be assumed that the whole bridge properties cost $1,400,000, the "citizen of Kentucky having the qualifications of an elector" would upon that much property be assessed upon 70 per cent. of its value (appendix to our brief, p. 22, sec. 4274), or $980,000. We have seen that the Henderson bridge on property which cost about $1,400,000 (it will not be con-

tended it cost more), about half the value of which, counting the approaches, is in Kentucky and half in Indiana, is assessed in Kentucky on a valuation of $649,735.54 and in Indiana on a valuation of $627,660, or a total valuation of $1,277,395.54, and has paid the taxes in both States on the respective assessments.

It is thus apparent that the plaintiff in error has been assessed about 25 per cent. higher than the "citizen of Kentucky having the qualifications of an elector," and has paid its taxes without complaint; and the amount of them is not, as stated, $6,437.99, including the tax in controversy, but, exclusive of that tax, the defendant in error has paid to Indiana $8,858.56 and to Kentucky and the county and city of Henderson about $10,000 (R., p. 9; facts alleged and not denied). The tax collected and sought to be collected in Kentucky is not separated, but the whole stated to be $25,375.34. We have arrived at the amount paid by apportioning this sum according to the amounts of the two assessments, that being the only way it can be shown on the record. It thus appears that the total amount of taxes already paid is about $19,000, which is 1⅓ per cent. of the cost of the property and a good deal more than the "citizen of Kentucky having the qualifications of an elector" and subject to the same rates pays on his property. But here the tax burden of the "citizen having the qualifications of an elector" ceases, even though on his investment he should make in his business $200,000 or $300,000. There is no income tax applied to him.

The attempt here, however, is to treat the Henderson Bridge Company quite differently, because it is found that after deducting from its *total gross receipts* the amount of the annual charge on its mortgage debt there remains $76,072.21. It is assumed that the whole of this sum is to be distributed to the stockholders, which, it is said, will yield a dividend of over 7 per cent., and upon this assumption the amount of the so-called franchise tax to be paid in Kentucky is fixed

at something over $15,000. The gross inaccuracy of these conclusions and injustice of the result is shown when it is remembered that no deduction is made for operating expenses, one item of which, viz., the taxes already paid, is about $19,000. If this should be deducted, the amount would be reduced to about $57,000, and if the tax in controversy should be sustained, it would take over 25 per cent. to pay for the privilege of doing the interstate business, and thus the amount belonging to the stockholders, the real people engaged in this business, would be reduced to about $42,000.

Indiana has not yet asserted its right to impose a tax on the franchises granted by it. If it should do so, assuming the value of the franchises to be about equal—and neither is worth a farthing without the other—there should be a still further reduction of about $15,000, which would reduce the amount belonging to the stockholders to about $27,000, from which, if there should be deducted the ordinary costs of operation, it may be well imagined that stockholders may be brought to consider the question of how much they can afford to lose for the privilege of doing this interstate business.

Upon the principal question discussed in our brief we should like to add a word.

If the tax is upon the franchise to be or to continue to be a corporation, under the decisions of this Court it is not prohibited by the commerce clause of the Constitution. If, on the other hand, the tax is on the franchise to do a purely interstate business, it is equally clear the tax is invalid.

The only question, therefore, on this branch of the case is, Which is it?

This depends upon the legislative intent. How is that to be ascertained? In the case of the Philadelphia Steamship Company, 122 U. S., 326, this Court laid down a test by which such intent might be ascertained, and, as that test is the key to the solution of the question, it

is important to note it particularly, for in that case the corporation was, as it is in this, a domestic corporation. In that case the contention of the State was, as it is in this, that the tax was upon the corporate franchise, and in that case, by the unanimous judgment of this Court—opinion by Mr. Justice Bradley—the whole argument and contention was disposed of by this single test: It was said that such could not have been the intention, "because by the terms of the act it (the tax) was laid equally on the corporations of other States doing business in Pennsylvania." Precisely the same test applied in this case shows clearly that the tax in question was not intended as a tax on the "corporate franchise," and as this Court asserted in the case mentioned that if the tax there involved was a franchise tax it was a tax on the franchise of doing an interstate business, and was therefore clearly void, we feel that on the authority of that case we may safely assert the same thing with reference to the tax in controversy, but we have the authority of the Kentucky court of appeals in construing the State constitution and this very statute to the effect that the franchise tax authorized by the constitution is in the nature of a tax "for the exercise of the mere privilege" of doing the business. (See full quotation in Brief, page 8, Levi *vs.* Louisville. Opinion recently delivered, not yet in the regular reports, but to be found in 30 S. W. Rep., 976.)

Under these authorities we submit that it is clear that the tax in controversy was imposed as a privilege tax for doing the business, and, being superadded to a very full property tax, is invalid.

Respectfully submitted.

JAMES P. HELM,
HELM BRUCE,
For Plaintiff in Error.

166-150

166-158

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 586.

LEVI C. WEIR, President of the Adams Express Company,
Appellant,

vs.

L. C. NORMAN, Auditor of Public Accounts for the Commonwealth of Kentucky.

Appeal from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR THE APPELLANT.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

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BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is a bill filed on behalf of the Adams Express Company to enjoin the collection and certification of taxes assessed against it for the year 1895 under Article III. of the Revenue and Taxation Act of November 11, 1892, ch. 108, being sections 4077 et seq., Kentucky Statutes, 1894. The case comes into this court on appeal from a decree of the circuit court, sustaining a demurrer to the bill.

ASSIGNMENT OF ERROR.

We submit that the tax complained of, and the statute of Kentucky under which it is levied, are in contravention of the interstate commerce clause, and of section one of the

fourteenth amendment, of the constitution of the United States, and also of sections 171, 172 and 174 of the constitution of Kentucky.

ARGUMENT.

The bill itself (to which we refer the court) states the plaintiff's case, with references to the sections of the statute. In a word, it shows that the tax complained of is not levied in respect of property within the state of Kentucky, or subject to the taxing power of that state.

It avers, and the demurrer admits, that the Adams Express Company had no property in the state of Kentucky in the year 1895 except certain horses, wagons, harness, trucks, safes, office fixtures and other appliances located at different points in the state, the items of principal value being horses, wagons and trucks used by the company in the collection and delivery of packages in various towns and cities; that all of said property, including the moneys and credits of the company within the state, were duly returned and assessed for taxation for state, county, municipal and other purposes at the fair cash value thereof, to wit: $36,614.53, and that the taxes thereon were duly paid.

The tax complained of is an assessment for state, county, municipal and other purposes on the further sum of $1,463,040. It is called by the statute "a tax on the company's *franchise*," "in addition to the other taxes imposed on it by law" (sec. 4077). Of course it that be its real nature it is in contravention of the federal constitution, because the company's principal business is interstate commerce, and it is therefore not competent for the state of Kentucky to impose a franchise or occupation tax upon it. Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196; Crutcher vs. Kentucky, 141 U. S. 47. In the latter case Mr. Justice Bradley said:

"As a summation of the whole matter, it was aptly said by the present Chief Justice in Lyng vs. Michigan, 135 U. S. 161, 166, 'we have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duty laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (141 U. S. 58).

But although the tax is designated by the statute a "franchise tax," "in addition" to the taxes assessed upon the company's property, and although the direction to the board of valuation is "to determine the value of the franchises" (sec. 4078), and the result of their determination is declared to be "the value of its corporate franchises" (sec. 4079), the circuit court sustained the tax as a property tax. But where, *in Kentucky*, is the $1,463,040 of *property* on which the tax is levied, and what is its character? There is none such, for the bill distinctly alleges, and the demurrer admits, the character of the company's property within the state, and shows that it is all comprised in the $36,614.53 of property on which the company has already paid taxes.

The circuit court says that this "is not an additional tax upon the same property, but a tax upon the *intangible* property of the company that has not been taxed as tangible property" (Opinion, Rec. 20). The court does not say what this "intangible" property is. It is not the moneys and credits of the company within the state, for they are taxed under section 4,058 (see first nine items of schedule), and are included, as the bill avers, in the assessment of $36,614.53 on which the company has paid taxes. Imaginary, fictitious property would be more apt terms. The court does indeed refer to it later as "a kind of intang-

ible property owned by corporations, *which from its very nature can not be owned by individuals*," and adds that "it is not an objection to taxing property of corporations, domestic or foreign, that no individual tax-payer has similar property" (Rec. 24). From which we infer that the "intangible" property that the court had in mind is, after all, a corporate franchise, which 'from its very nature can not be owned by individuals." Indeed, in his opinion on the demurrer to the amendment of the bill, the learned judge says that "the value of the franchise is intended to be estimated as intangible property," and he concludes that opinion with the suggestion that it is not necessary to consider whether the rule of uniformity declared by the state constitution "applies to taxes based upon income, license and franchise." The conclusion we draw from these various expressions is that the tax was really conceived by the learned judge as one imposed on the income or franchise or business of the company, and that is what it really is. In Henderson Bridge Co. vs. Commonwealth, 31 S. W. Rep. 486 (May 25, 1895) the Court of Appeals held that the assessment should include the value of the franchise, and the tax in that case was sustained as a franchise tax. As such it was not open to the objection now urged by the Adams Express Company, for the Adams Express Company is a non-resident joint stock company or co-partnership engaged in interstate commerce, whose franchise or occupation can not be taxed by the state of Kentucky, while the Henderson Bridge Company is a corporation of Kentucky, deriving its corporate existence from that state, and its corporate franchise is therefore taxable by that state.

In Levi vs. City of Louisville, 30 S. W. Rep. 973 (May 4, 1895), the tax imposed by section 4077 is distinctly referred to by the Court of Appeals as a "franchise" tax, assessed on a basis of valuation not permissible, under the constitution of

the state, for the assessment of *property*. After pointing out that the mode of valuing *property*, to wit, at its fair cash value, is fixed by the constitution itself (sec. 172), while the mode of valuing franchises is left by the constitution to the discretion of the legislature, the court refer to section 4077 as an exercise of the latter power and say:

"It must be conceded that if the mode of valuing a franchise had been fixed by the constitution, as is found in the statute, no power would exist with the legislature to adopt any other mode." (30 S. W. Rep. 976.)

In view of these decisions we submit that the circuit court erred in disregarding the nomenclature of the statute, and in holding that the tax imposed by section 4077 is not what the statute itself says it is, viz.: a franchise tax, but a property tax. If we are right in this view, if the tax is really a franchise tax, no debatable question remains in the case.

In plain English the tax is levied on that proportion of the company's capital shares, estimated at their market value, which the length of its lines in Kentucky bears to the total length of its lines. And such a tax will be attempted to be defended in this court, on the theory that the "route" of an express company that owns neither the railroad or the cars, the river or the steamboat, the turnpike or the stage coach, is a *thing* like a railroad, or a telegraph, or a turnpike, to be measured and valued by the mile, a thing distinct from and in addition to the horses, wagons, trucks, safes and other appliances that the company owns or uses in operating the route; so that 1913 miles of express "route" in Kentucky are assessed at $764 per mile, or $1,463,040.

The route of an express company is the imaginary line along which its messengers travel by railroad or boat or stage coach, as the case may be. The length of the route is the distance between the point of departure and the

point of arrival. A messenger carries packages on the steamboat that plies daily between Cincinnati and Louisville. The express company owns neither the river nor the boat, but there is nevertheless what we call a "route" of 150 miles, which the Kentucky and Indiana statutes deal with as if it were a railroad or a turnpike, worth according to the Indiana statute, $250 per mile or $37,500, and according to the Kentucky board $764 per mile or $114,600.

It is curious to notice that in Kentucky the *imaginary* line of the Adams Express Company is valued for taxation at $764 per mile, while the *real* line of the Western Union Telegraph Company, as shown by the record in No. 614, is fixed at $120 per mile. But of course figures are out of place and comparisons odious in the "intangible" realm of speculation and imagination into which such a statute introduces us.

A railroad or telegraph is an actual, tangible, physical thing or unit, that may to be taxed as such, but which has no market value in the ordinary sense of the term. For purposes of taxation resort must therefore be had to its intrinsic value, and that is dependent upon its location and other circumstances affecting its earning power. There is no other practicable method of assessing it, *as property*, and the courts have therefore sanctioned that method. But the property of an express company is of the ordinary kind, susceptible of valuation in the ordinary way, as the same and similar property is valued for taxation in the hands of all other owners. The Kentucky statute substitutes for, or rather adds to, such a valuation, the assessment of something else. The result is not, and does not purport to be, the value of *property* held or owned by the company in the state of Kentucky, or subject to the taxing power of that state. The company has $36,614.53 of property in Kentucky, and not $1,463,040.00.

The idea that the *property* of express companies can be assessed for taxation otherwise than according to its ordinary value, is inconsistent with the observations of this court in Pacific Express Co. vs. Seibert, 142 U. S. 339, 354, where M. Justice Lamar, in justifying an excise tax on the receipts of railroad express companies says:

"Express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted."

To the cases cited in our Ohio brief (Nos. 398, 399, 400, pp. 22-24) in support of the proposition that a state can not tax property beyond its territorial jurisdiction, we add the observation of Mr. Justice Harlan in Erie Railroad vs. Pennsylvania, 153 U. S. 628, 646:

"No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. State Tax on Foreign-held Bonds, 15 Wall. 300, 319; Railroad Co. vs. Jackson, 7 Wall. 262; St. Louis vs. Ferry Co., 11 Wall. 423; Delaware Railroad Tax, 18 Wall. 206."

The tax can not be supported as a tax on a corporate franchise because the Adams Express Company is not a corporation, but a co-partnership. Chapman vs. Barney, 129 U. S. 677 Gregg vs. Sanford, 28 U. S. App. 313; 65 Fed. Rep. 151; Taft vs. Ward, 106 Mass. 518; Gott vs. Dinsmore, 111 Mass. 45; Boston & Albany R.R. Co. vs. Pearson, 128 Mass. 445. If the company were a corporation, its corporate franchise, derived from the state of New York, could not be taxed by the state of Kentucky. In this respect our case is wholly different from that of the Henderson Bridge Company.

THE OBJECTIONS TO THE TAX UNDER THE CONSTITUTION OF KENTUCKY.

If the tax is really what the statute calls it, "a franchise" tax, it is clearly in contravention of the constitution of the United States, as applied to the plaintiff's company, whose business is chiefly interstate commerce. It was only by construing the tax as a property tax that the circuit court got over that difficulty under the federal constitution. But considered as imposing a property tax, the statute, *as applied to express companies*, is not only obnoxious to the federal constitution (as we have endeavored to show), but also to section 172 of the constitution of Kentucky, which declares that "all property not exempted from taxation by this constitution shall be assessed for taxation at its *fair cash value* estimated at the price it would bring at a fair, voluntary sale," because the statute does not tax the property of express companies, such as they have in Kentucky, at its fair cash value, or indeed with any reference whatever to its value as property.

In Levi vs. City of Louisville, 30 S. W. Rep. 973 (May 4, 1895), where it was held that, under the constitution of Kentucky, a license tax could not be imposed in lieu of an ad valorem tax on personal property, the Court of Appeals referring to section 172 of the constitution, say:

"The power to prescribe the mode of assessment or ascertaining the value of property has been taken from the legislative control and fixed by the constitution; so there is nothing left but to follow its provisions, *and no authority is given to the legislature to value or have property valued, but in one mode.*" (30 S. W. Rep. 975.)

And again,

"Under the former state constitution, the right to impose one rate of taxation on one class of property and a different

rate on another class was well understood, but, in considering the provisions of the present constitution, we find the mode of assessment prescribed by that instrument requiring in plain terms that all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. *It would do violence not only to the intention of the framers of this instrument, but its letter and spirit, to hold that the system adopted by its provisions could be disregarded, and another selected,* better suited to the business of the municipality, and more just and uniform in its terms." (30 S. W. Rep. 975, 976.)

And again:

"The framers of the constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation; and however wise or unwise the system may be, it is the mandate of the constitution that all must obey." (30 S. W. Rep. 977.)

The statute, considered as imposing a property tax, is also in contravention of section 171 of the constitution of Kentucky, which declares that taxes "shall be *uniform* upon *all* property subject to taxation within the territorial limits of the authority levying the tax," because under its operations the horses, wagons and other appliances of an express company are not taxed as the same and similar property is taxed in the hands of other owners.

It is also in violation of section 174, which declares that "all property, whether owned by natural persons, or corporations, shall be taxed *in proportion to its value*, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property," because, as appears from the allegations of the amendment of the bill (Rec. 26) a large proportion of the moneyed capital in the commonwealth is employed by individuals, co-partnerships and corporations (engaged in mining, manufacturing,

commercial and other business) that are not taxed under article III. of the Revenue Act at all, nor upon the basis or principle of valuation applied to the companies mentioned in section 4077.

THE REMEDY BY INJUNCTION.

No objection was taken in the court below, and we do not understand that any will be taken here by the commonwealth against the form of the suit or the remedy sought. It is the desire of both parties to obtain the judgment of this court upon the question of the validity of the tax, and stipulations have accordingly been entered into in other cases pending in the circuit court, and in respect of taxes not yet in litigation, to abide the decision of this court on that question.

What judicial relief shall be granted against illegal taxes is a question of the public policy of the particular state. In some states, as in Ohio, relief by injunction is the remedy provided by statute. In others, as in Kentucky, the same remedy is established by judicial authority, L. & N. R.R. vs. Warren County, 5 Bush. 243; Gates vs. Barrett, 79 Ky. 295; Louisville Water Co. vs. Clark, 94 Ky. 47. Where the statute of a state provides that remedy it will be enforced on the equity side of the federal courts (Cummings vs. National Bank, 101 U. S. 153, 157), and there seems to be no good reason why the federal courts should not give the same effect to the public policy of the state declared by judicial authority.

In Gates vs. Barrett, the right to enjoin an illegal tax in Kentucky is placed by the court upon the ground that there is no adequate remedy at law in that state. The court says:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop and inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon

the ground of the inadequacy of the remedy at law. The officer acting in good faith and under the color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the state directly, the only complete remedy is by injunction." (79 Ky. 296, 297.)

But, independent of state policy and practice, the plaintiff has a right, upon the allegations of this bill, to resort to a court of equity, to prevent a multiplicity of suits. Cummings vs. National Bank, 101 U. S. 153, 157; Shelton vs. Platt, 139 U. S. 591, 594; Pacific Express Company vs. Seibert, 142 U. S. 339, 348; Marshall vs. Holmes, 141 U. S. 589; 2 Daniell's Chancery Practice (5th ed.), 1661 n. (3), and cases cited.

He is also entitled to an injunction upon the further principle recognized in Cummings vs. National Bank, which was a suit going up from Ohio to enjoin the assessment of shares of stock in a national bank. The court, after considering the Ohio statute permitting injunctions against illegal taxes, said:

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given." (101 U. S. 157, 158.)

Judge Cooley (Taxation, 2d ed. 785), in speaking of injunctions against fraudulent assessments, after observing that "an assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive," says, "but if it is purposely made too high through prejudice or a reckless disregard of duty, in opposition to what must be the judgment of all competent persons, or through the adop-

tion of a rule which is designed to operate unequally upon a class, and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction." It is the "gross error" referred to in P. C. C. & St. L. Ry. Co. vs. Backus, 154 U. S. 421.

The plaintiff is entitled to resort to equity for the further reason that section 4021 imposes an illegal lien upon all of its property in the state, which the statute declares "shall not be defeated by gift, devise, alienation, sale or any means whatsoever" during five years.

Section 4091 by way of special penalty against express and other companies taxed under Article III. of the Revenue Act, declares that after thirty days' delinquency the company shall be deemed guilty of a misdemeanor and be subject to a fine of fifty dollars for each day the tax remains unpaid, to be recovered by indictment or civil action.

The suit is properly brought by the plaintiff on behalf of all of the members or co-partners, because they are so numerous and constantly changing that one is entitled to sue in equity on behalf of all. Platt vs. Colvin, 50 Ohio St. 703, and the English cases there cited.

We respectfully submit that the decree of the circuit court should be reversed, and the case remanded, with directions to overrule the demurrer to the bill.

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Office Supreme Court, U. S.
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166-170

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 586.

LEVI C. WEIR, President of the Adams Express Company,
Appellant,

vs.

L. C. NORMAN, Auditor of Public Accounts for the Commonwealth of Kentucky.

Appeal from the Circuit Court of the United States for the District of Kentucky.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

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The plaintiff is entitled to resort to equity for the further reason that section 1021 imposes an illegal lien upon all of its property in the state, which the statute declares "shall not be defeated by gift, devise, alienation, sale or any means whatsoever" during five years.

Section 1091 by way of special penalty against express and other companies taxed under Article III, of the Revenue Act, declares that after thirty days' delinquency the company shall be deemed guilty of a misdemeanor and be subject to a fine of fifty dollars for each day the tax remains unpaid, to be recovered by indictment or civil action.

The suit is properly brought by the plaintiff on behalf of all of the members or copartners, because they are so numerous and constantly changing that one is entitled to sue in equity on behalf of all. Platt vs. Colvin, 50 Ohio St. 708, and the English cases there cited.

We respectfully submit that the decree of the circuit court should be reversed, and the case remanded, with directions to overrule the demurrer to the bill.

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166-150

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In view of the fact that the court, since the argument and submission of this case, has announced certain decisions that may have a most important bearing upon this case, we beg this opportunity to present now some further suggestions concerning the case at bar, which we would have urged at the oral argument, if the opinions referred to had then been announced.

We refer to the decisions of the court in the Ohio and Indiana express tax cases, and to the doctrine of the *unity of use*, as affecting the taxation of express companies, which was not raised or suggested by the counsel for the appellant, either in his brief or in his oral argument, or by the court at the hearing, and which, therefore, as well as for other reasons hereinafter stated, we did not feel called upon to discuss on our side. In view of the influence which that doctrine may

have upon the decision of this case, to say nothing of its far reaching effects upon some of the most important questions of constitutional law, we trust that the court may deem it proper to give attention now to the following suggestions concerning the decision referred to.

It is important in the first place that the precise substance and effect of the decision should be stated.

A review of the decisions of this court prior to the argument of the present cases and referred to in the opinion of the court just pronounced as being, in point of authority, the foundation of the decision is appended hereto in an appendix.

From this review it is believed that the following is a fair and just statement of the propositions actually determined by those decisions.

1. They rightly assume two principles as incontrovertible; first, that, so far as concerns the taxation of *property*, a state can not tax, as against non-residents, any property except such as has an *actual situs* within its limits; second, that no state can tax or burden in any form the business of interstate commerce.

2. That where a state *assumes* only to tax property *actually situated within its limits*, it does not violate either of the above principles if, in ascertaining the value, it adopts *the ordinary method* of assessment; or, where the ordinary method is not practicable, some other fair and reasonable method.

3. That in the case of railroad and telegraph companies, the ordinary method is not applicable, and the method of taking into view the value of the *whole*, in order to ascertain the value of the part, is fair and reasonable, at least so far as to justify an apportionment of value according to *mileage*.

The step taken by the decision in the Ohio cases is to evolve a new general proposition, not declared or distinctly discussed

in any of the prior cases, that where there is what is called a *unity of use* between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the state, the value of the parts within may be determined by the value of the whole, even though the part within is *physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses*, differing in nothing, so far as the ascertainment of value is concerned, from the thousand other classes of chattels which form the usual subjects of taxation.

No precise explanation is given of just what this *unity of use*, which involves such momentous consequences, may be; but it is held that the property of express companies is of that character.

This doctrine of the effect upon taxation of a *unity of use* was not discussed in the prior cases, and was not touched by appellants' counsel in the argument of these cases. The excuse for this omission has been given. But the argument which they thought abundantly sufficient to defeat the assessments consisted in pointing out that the property taxed was, both physically, and in respect of ownership, *capable of separation without altering its identity, or any of its properties, or its value, as ordinarily understood*, and would remain, after separation, an ordinary subject of taxation, and that to tax it as it was taxed under the Ohio law, was *in effect* to tax property outside of the state, and also the business of interstate commerce. This argument, which seems not to be disputed, must be regarded as rendering the validity of the taxation, at least, doubtful. The weighty dissent fairly entitles it to be so considered.

The additional arguments and illustrations which they might have adduced, but did not, are as follows:

1. The *unity* which makes the property so taxable is said in the opinion of the court to be dependent, not upon *physical*

connection, or unity of ownership, but to be sufficiently constituted by unity of *use*.

But suppose the Adams Express Company should, in Kentucky, *hire* all its horses, wagons, etc., as it easily might without materially affecting its business, and for the ordinary rates. The same *unity of use* would continue. Would the *owner* (the horses, wagons, etc., being worth $36,614) be properly assessed for taxation at $1,463,040, although he had no interest in the express business? If not, is there really any *unity of use* which justifies these assessments?

2. Again let it be supposed that the company *reduces* the amount of its horses, wagons, etc., to one half, not by hiring from others, but by *substituting human carriers*, which it easily might do without substantially affecting its receipts. This would not alter the proportions of mileage, or gross receipts, and therefore, although the amount of the property *purporting to be valued* were reduced one half, the *valuation would be the same*. And, supposing it hired all its horses, wagons, etc., *except one horse and wagon*, owning no other personal property than that, the valuation would still be unaffected.

3. If, however, it should hire *all* and own no personal property whatever, it would then be wholly relieved, for the assessors would be left without a subject for assessment: That is to say we have a scheme of assessing the value of the personal property owned by express companies in Kentucky wholly unaffected by the amount which is owned.

4. Perhaps it may be suggested that the assessment would, in the case of hiring by the express companies, stand as an assessment not of the *property* but of its *use*. But under this law, certainly, nothing can be assessed except the value of the *property*, and that against its *owner*. Let it be supposed,

however, that this were otherwise, or that the law were changed so as to tax the *use*. Would the *owners* of the horses and wagons still be justly taxable on them, and on what amount? Or, would this property be exempt from further taxation? There would seem to be no just reason for not taxing it against the real owner, and on the full value; and in that case we would have a horse assessed at its true value, $150 to the *owner*, and at about $4,000 to the *user*.

5. And yet, in the case last mentioned, consistent reasoning requires that the owner should be exempt, for if the plant really be united it is *inseparable*, and if it remains *in* the unity for purposes of taxation, it can not at the same time be out of it for the same purpose.

It may, indeed, be suggested that the case would be one, after all, only of double taxation, and that this, however flagitious, is not a subject of criticism in a federal court. But we beg to refer to the opinion of Mr. Justice Brewer, in Cleveland, etc., R. R. Company vs. Backus (154 U. S. 439), repeatedly approved, and so recently as in the case of W. U. Tel. Co. vs. Taggart (163 U. S. 1), that it is only *fair, reasonable, ordinary, necessary* taxation which is, in such cases, a defence against the charge of violating both the fundamental principles above referred to, which principles are committed to the care of the Supreme Court.

6. But what shall be said of the pretence by Kentucky that the different parts of the plant are an *inseparable unity* when she herself asserts that they are *not*, and, *in this same law*, actually separates them for the purpose of taxation? For that state finds no difficulty in separating them, and imposes on the company entirely separate assessments for state, county and municipal purposes, on both its real and personal property, estimating both at their ordinary cash value. And the same is true of the Indiana Statute.

The real estate of the companies in Ohio is there assessed like that of other owners. The law requires *this assessed value* to be included in the return made by the companies to the board of assessors, and *adopts* it and taxes it accordingly and separately. It thus assumes and declares that the value of *this* property, although as much a part of the unity as any other, does *not* depend for its value, as it plainly does not, upon the use to which it is put, but upon the same elements which determine the value of all other lands and buildings in the state.

7. The principal idea which underlies the opinion of the court and is made to defend these extraordinary assessments is that the value of property is dependent upon the *use* to which it is put. We earnestly request the court to reconsider this proposition. It is an expression which has several times been employed to support the doctrine declared in the railroad and telegraph cases, and in the sense there intended is entirely just. In cases where the ordinary and nearly universal methods of ascertaining value can not be employed, where the thing to be valued has no market value, where it can not be *indefinitely produced*, where there is no *supply and demand*, there is a necessity of resorting to other considerations, and the *productiveness* of the property, in other words, the value of the *use* of it, is a *natural, ordinary* and *proper* inquiry; for if the thing were to be sold just as it is, that would be the inquiry of the intending purchaser. But this method is the creature of necessity, and should be carefully limited to that necessity. Can it be thought for a moment that this proposition should be made general and the value of property generally be held to be determined by the *use* to which it is put, and not at all by the fact that it is a common subject of sale in the market, and has a distinct and certain market value? What would be said of a system of taxation of ordinary property wholly within a state, which

should direct or permit an assessing board to displace the ordinary tests of value, namely, what the things are bought and sold for, and inquire, in each instance, into the profits which the owners made who use them, and then impute those profits to the particular thing, making houses and lands, horses and cattle, and all other chattels bear every variety of value? Such a system would be in violation of fundamental notions of right, and would make fairness and equality in taxation impossible. It would not be taxation, but arbitrary exaction. And yet this would be justified if the proposition under notice were sound.

If this is not sound as a *general* proposition, is it sound in any cases, and why is it sound in them? It is sound in cases *where there is no better method*, and sound because necessary.

We have referred to the opinion of the court in Cleveland, etc., Ry. Co. vs. Backus (154 U. S. 439), drawn up by Mr. Justice Brewer, as laying down the true reason (necessity) for the assessment of part of a railroad lying within a state, by a reference to the value of the whole. In that opinion there are, indeed, expressions to the effect that the value of all property is determined by its use, as if this were true as a broad and general proposition (p. 445); but did Mr. Justice Brewer really mean this? Did he mean that this was the ordinary test? Did he mean that where the common judgment of men, based upon all the elements of value, the *uses* to which the property may be put, *supply and demand*, etc., had established a value (for this is what is *ordinarily* meant by value) that judgment could be *disregarded*, and an assessing board be permitted to establish another value based on *use* alone, or did he mean that in those cases where common judgment had never had occasion to fix a value, and never had done it, and where, consequently, a value so fixed was not available, an assessing board was *obliged* to have recourse to the original elements of value and make up, as best it could, a judgment? We have only to recur to the other parts of the

opinion to see that the latter meaning was all that he intended.

8. What then is the precise error, as we humbly conceive it to be, in the decision? It finds that in the railroad and telegraph cases there was declared to be property actually situated within the state and therefore taxable there. The problem, as declared by the court, was to ascertain its *cash* value. There was no market value. The subject of taxation was not one capable of indefinite production, and not subject to the operation of supply and demand. To separate it from the use to which it was put would be to destroy it, and it would have no value, except as a ruin, for its materials. But yet it *had* a cash value which a purchaser would give for it, and this *in the purchaser's mind* would depend on the *use* to which it was put. Now in *those cases* the use to which the thing was put was in inseparable unison with other things, together constituting a whole, as much as a dwelling house which happened to rest on both sides of a state line, and the value of the whole was the material thing to be determined.

What the prior decisions establish is that where the value of a thing proper to be taxed can not be ascertained by ordinary methods, its *use* may be referred to, and where its use *is* in inseparable combination with a whole of which it forms a part, the value of the whole may be referred to. What the court now apparently construes that decision to be, is that wherever the *use* of a thing in one state is in combination with other things outside of the state as a whole, its value for taxation may be determined by a reference to the value of the whole, *notwithstanding* that there is no difficulty in physical separation or in separation of ownership, and notwithstanding that the part within the state has the same full and perfect value *after* separation which it possessed before combination. As to railroads and telegraphs the parts within one state can not be sold, delivered and taken away by a purchaser without destroying the value. Let it be imagined

that this could be done, and that the price were easily ascertainable, can it be thought that the method of assessment adopted in respect to them would have been sanctioned? It was the impossibility of this which was the ground and the sole ground of the decisions.

9. There is manifest from the face of the opinion an impression on the part of the court that there is equity and justice in the methods sanctioned, and that the express companies are seeking to avoid just contributions. This is most unfortunate. It should not be assumed where the question is alone as to the constitutionality of methods, for the records can not contain the facts upon which such an assumption can either be justified or repelled. The opinion contains this statement. "Considered as distinct subjects of taxation a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,430 worth of horses, wagons, safes and pouches produce $275,446 in a single year; or, $28,438 worth $350,519? The answer is obvious." It is not intended, we assume, by this language to impute to the appellants an assertion of the fact implied by those interrogatories. They mean that in the opinion of the court the horses, wagons, etc., sought to be taxed, are the real sources from which the large sums mentioned are derived; or that they may be justly so regarded for the purpose of taxation. But ought not this to be reconsidered and retracted? *Some* agency in producing these sums (for they are *gross* receipts) will, of course, be allowed to the physical labor of a large number of people, mere laborers, who must be paid out of the receipts; something more to the skill and superior talents of principals and subordinates who could earn, in various callings, large salaries, and some of them very large, and who must also be paid out of the receipts; something more to an accumulated fund derived from past profits which furnishes the public with an assurance of responsibility; something

more to those habits of patronage, commonly called good will; and a great deal to the services performed by the railroad companies, for it is a matter of common knowledge that the express companies are required to pay nearly one half of their gross receipts to the railroad companies for transportation. If fair and just minded men should deliberately estimate in the best possible manner the proportion to be awarded to each of these sources, would the amount properly to be ascribed to these horses, wagons, etc., be one particle more than is represented by their actual value as set forth in the returns? Certainly there is nothing perceived in these records which enables the court to say that there is, and the appellants assert most confidently that there is not.

There is evidently an impression that the contracts which express companies have with the railroads are sources of large profits. If this were the fact it is not perceived how it would affect the value of horses and wagons used by the companies; but the impression is erroneous. Railroad companies are as exacting as other persons in the compensation they demand for their facilities, and just as exacting towards express companies as towards others.

But why is it that all these receipts are imputed to the horses and other personal property? If one piece of property can be *selected*, and the entire receipts be imputed to that, why can not another piece be as well taken? Why can not the real estate in Ohio be taken and the personal property be dropped, just as well as to take the personal and leave out of view the real estate? The real estate in the case of both the Adams and the American Company is of more than twice the value of its personality, and yet that is not supposed, in the opinion, to contribute anything to the receipts.

10. It is said in the opinion that the appellants' returns of their property "did not take into account contracts for transportation and accompanying facilities." We are not

advised whether the court means to suggest that such contracts constitute property which is subject to taxation by the states in which the railroads are situated.

(a) We submit in the first place that the statutes do not undertake to assess the railroad contracts of express companies as property. They do not require the express companies to return such contracts to the assessing board or direct the board to estimate their value.

(b) We submit next that express companies' railroad contracts are not *property*. They do not create in the express companies any interest or estate in the railroads. They simply reduce to writing, for purposes of convenience and certainty, the details of the service to be rendered by the railroads and the compensation to be paid therefor. The only property involved is the railroad, which belongs not to the express company, but to the railroad company, and which is taxed as such against the railroad company, and that too upon the basis of its value as affected by its earnings from express companies and other patrons.

The railroad facilities are no doubt valuable to the express companies; indeed they are essential to the conduct of the express business, as they are to the conduct of business generally. But that does not make them *property*.

In Exchange Bank of Columbus vs. Hines (3 Ohio St. 1), the Supreme Court of Ohio held that the franchise of a bank was not *property* subject to taxation under the Constitution of Ohio. The court, speaking by Bartley, C. J., said:

"Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of great value. But value is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this state, or a license to carry on any

special business which is prohibited without a special grant of authority from the government, may be valuable; and a right to either of these things may be asserted and maintained in a court of justice, yet neither of them possess the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property, are such as the owner may exercise exclusive dominion over in the use, enjoyment and disposal of them, without any control or diminution, save only by the laws of the land. 1 Wend. Bla. 138. It is a fundamental principle, that "property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them." Rutherford's Institutes, 20 Puffendorf, chap. 9, b. 7.

"It is said that capability of alienation or disposal, either by sale, devise or abandonment, is an essential incident to property." 2 Kent. Com. 317. (3 Ohio St. 7, 8.)

In ex parte Gilchrist (17 Q. B. D. 521) it was held that a power of appointment under a deed or will is not the "property" of the donee. Fry, L. J., said:

"No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property,' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.'

In one sense, no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of the word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition."

(c) It has been said several times in opinions delivered in this court that it is not within the power of a state to levy a tax against a person engaged in interstate commerce for the privilege of constructing or using an instrumentality of interstate commerce (154 U. S. 445, 446). In Postal Telegraph Cable Co. vs. Adams (155 U. S. 688, 696) Mr. Chief Justice Fuller said:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or inernational commerce, or for the carrying on of such commerce."

The express companies must use the railroads. For convenience they must reduce to writing the terms under which the railroads perform services for them. But the states can hardly be permitted to tax express companies for the privilege of employing railroads to render service in interstate commerce; or tax as property contracts which create in the express companies no interest or estate in property. But it is not necessary to enlarge upon this point, for the reason that, according to the decision itself, the contract can only be reached as being an inseparable part of the *whole plant* of the company, of which the horses, wagons, etc., are another inseparable part. If the notion of a *unity* falls, there can of course be no ground upon which the contracts can be made to add anything to the value of the property assessed in Kentucky. Account might just as well be taken of any other part of the

property of the company as of the contracts referred to. If the notion of unity is not maintainable, it follows necessarily, that any attempt to add to the valuation of the horses and wagons by a reference to anything except the intrinsic value of those articles themselves, must fail.

11. It must certainly be admitted that a *part* of an assumed unity can not be valued by a reference to the value of the whole as determined by its productive use, unless the *whole* could be properly so assessed. It must therefore follow that a state in taxing properties wholly within its limits may properly tax things *united in use* as a whole, by reference to the supposed productiveness of the whole. Would it be endurable to tax *farms, cattle, hay, tools* and all as a *unity*, by a reference to productiveness, instead of by the ordinary method? And is an express company more of a unity than ordinary farms?

12. Mr. Justice Brewer declared, in the opinion so often referred to by us, that if a taxable thing were situated within the limits of a state and *had a cash value*, the fact that such value was in part derived from the circumstance that it was an instrumentality of interstate commerce was immaterial; and he might with equal truth have added that if its value were, in part, derived from its use in inseparable connection with other property actually situated outside of the state, that circumstance would be immaterial. In both instances it is the value only of property actually situated within the state which is taxed.

But let it be supposed that there are multitudes of the *same things*, situated in the *same state*, all equally *capable* of being used as the *same instrumentalities*, and all having an *ascertained ordinary value*, can an assessing board disregard *this* value and recur to the original elements which are supposed to make value, or to *one* of them, namely, *use*, and

declare *another* value, twenty, or a hundred times greater? If it can, we are out of the domain of law, and without a defense against injustice and oppression.

The main defense against unlimited oppression in the name of taxation lies wholly in the *rule* which limits assessors to *ordinary* value. Even with that rule much oppression is possible, for in many instances just men do not agree as to the value when the ordinary rule is applied. But when the rule is discarded there is scarcely a limit to the possible abuse. It must be laid aside in *some* instances; but necessity alone should be held sufficient to justify it.

13. True, indeed, *use* is one of the elements which give property its value; for, unless a thing is *useful*, it has no value; but it is not the *actual use*, but the *capabilities of use* which constitute the effectual element. The value of horses in Ohio, aside from the effect of supply and demand, arises from the fact that they are capable of use for many different purposes. If they were capable of use for but one purpose, the demand would be infinitely smaller and the value less. The value of horses in Ohio is affected, therefore, by their capability of use in the express business, and every horse in Ohio is equally capable of this use, and their market value is based, in part, on that fact. Are the horses actually employed in this use any more *capable* of it than others?

The part situated in Ohio of a long line of railroad is *capable of no other use*, and there are no other *like* pieces of property situated in that state and capable of being applied to a multitude of other uses, which can be substituted in place of the piece actually used. If the case were otherwise such pieces of railroad would have a market value in Ohio. In that case could such market value be set aside and the roundabout and complicated method of ascertaining the value of the whole line, involving, in effect, taxation of property situated outside of the state, and

burdening interstate commerce, be substituted in order to reach another and an artificial value?

If the only use of horses, wagons, etc., in Kentucky, was in the express business, and they had no other value except that dependent upon such use, then the authority of the railroad cases might more justly be invoked, and the rules there sanctioned applied.

14. If we were to put the doctrine of the Ohio scheme in its scientific form, it would be as follows:

"It is true that the Ohio law authorizes the assessment only of the horses, wagons, etc., of the express companies; yet it *identifies* these by an *intellectual fiction* with an indivisible part of what is imagined by another intellectual fiction as the 'profit producing plant' of the express companies; and, therefore, the value of that indivisible part is properly ascertained by reference to the value of the whole."

But we beg the attention of the court to the maxim that *intellectual fictions* are to be resorted to only for the purposes of *justice*, *convenience*, *certainty* and *order* in the law. Here they are resorted to (we must not say for the *intentional* purpose), but, certainly, with the necessary effect of bringing about the very opposite results, which is substantially the same thing.

And we beg further to say that if the state of Ohio is authorized, for the purposes of taxation, to *identify* by an intellectual conception the horses, wagons, etc., with an indivisible part of an *imagined thing*, it must be for the reason that such indivisible part of an imagined thing might *itself* have been *directly* subjected to taxation. Can this be possible?

But in the case of railroads and telegraphs no intellectual fictions are employed. The parts in one state are *real* indivisible parts of *real* wholes.

15. The rules approved in the railroad and telegraph cases

are based upon *necessity*. The decision in these cases takes a rule founded on necessity and follows it and extends it, as a new point of departure, just as if it were founded on *principle*, and applies it where no necessity exists.

We respectfully ask the court to consider the certain error which results from such a method. A rule adopted from necessity is, *confessedly*, susceptible of no other defense, and therefore *wrong*. If it were defensible upon other grounds, it would be put upon such grounds, and necessity would not be resorted to. Hence, rules founded on necessity are *never to be extended*. If other cases of necessity arise, that necessity will dictate its own rules.

Let us illustrate: The electric power works in which many millions have been invested at Niagara Falls, may largely furnish their power by wires through Canada and Pennsylvania. Those states will have the right to tax the property situated in their respective limits. There will be no *market* or *ordinary* value to it. Consequently, the value must be ascertained by reference to other things. The rule of *mileage* will plainly not be applicable, nor that of gross receipts. Necessity will force the adoption of the best practicable method.

16. The sleeping car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from state to state; they had a physical *situs* in one as much as in another; but the whole could not be said to have a situs in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable. This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived

that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in Marye vs. Baltimore & Ohio R. R. (127 U. S. 117, 123) cited and approved by the court in the Pullman cases, to-wit, to ascertain and appraise the average number of cars habitually used in the state.

If the horses, wagons, etc., of the express companies, were constantly on the move from one state to another, the decision in the Pullman case would have defended, not indeed the methods actually adopted in the express cases, but some method which would answer the necessities thus presented.

17. Taxation is administrative business, and the system must be workable; but the method sanctioned by the decision is wholly unworkable. It is wholly repugnant to all other parts of our systems of taxation, and would compel a revolution in them; and the oppression and injustice which would follow would be unendurable.

a. What is to be the effect on the ordinary methods of assessment in the various states? If various pieces of property used in connection in different states are to be taxed as part of a unity in some of the states, it must be in all, and the separate value of the parts be disregarded, and real and personal be alike included in the unity. The practice now universal of taxing persons and corporations in the state of domicile for all personal and real estate except such as is physically situated elsewhere must be abandoned in the case of things *united in use*.

b. Each state is the judge of the size of the part over which it has jurisdiction, and when the separate parts are ascertained they may (they certainly will) amount to twice, or thrice the whole, and, very probably, even more.

c. Against this injustice and oppression the law affords no defense. There is no common tribunal which can determine the value of the whole and of the separate parts.

If an appeal be taken to this court, the answer will be "We can not review determinations of fact," and yet the whole mischief lies in determinations of fact.

In one state the proportion will be reached by a comparison of *mileage;* in another by a comparison of *gross receipts.* Upon what principle can this court declare that one is wrong and the other right?

d. An avalanche of litigation impossible to be dealt with will be the result. The victims will of course resort to this court before submitting to absolute ruin. The exactions they will show will shock the sense, and yet no fraud can be proved, and no rule invoked by which the exactions can be reduced to just sums. And the necessities for relief will, as they always do, subject just and established rules to a strain under which they will break down.

e. It is taxation without representation; with all its evils. The citizens of Kentucky can compel each other to establish justice and equality as between themselves. But what means have the citizens of New York to resort to to compel justice at the hands of the citizens of Kentucky.

18. The framers of the Constitution intended to create what would be, in substance, one country; at the same time they could not dispense with the existence of sovereign states. And as a substitute for the ordinary remedies, as between sovereign states, of war and retaliation (resorts no longer admissible) they provided the following safeguards: (1) First and foremost, the fundamental principle that the property of the citizen of one state could not be taxed by another unless it had an actual situs within the latter. (2) By making it impossible that any state impose any burden, by way of taxation or otherwise, upon any of the instrumentalities of

interstate commerce. (3) By declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." These provisions, however, would be of comparatively little value if their interpretation and enforcement were allowed to rest with the states themselves; and therefore, another provision was added, namely: (4) a power to transfer, in certain cases, judicial proceedings in the states to the courts of the United States, and in other cases to subject the decisions of the former to review by the latter. These latter safeguards, quite efficient in many cases, would be substantially powerless in relation to the matter of taxation. Proceedings to assess property can not be transferred, and indirect review is effective only when distinct principles of law are violated, whereas, in the determination of the value of property, opinion and discretion are the effective elements and the exercise of these by the state officers, can not be effectually supervised, checked or restrained. If an attempt is made to tax the property of a non-resident not having an actual situs in the state, the safeguard is entirely effectual. If the ordinary rules limiting assessment to value as value is ordinarily understood, are applied, a protection is secured equal to that which a citizen has in cases of the assessment of his property in his own state. If these rules of valuation are allowed to be disregarded or superseded by another as to which there is no safeguard, a citizen of one state has no defense against the exactions which may be imposed upon him by another. These United States will cease, in many of the most important respects, to be *one country*, but will become *independent nations*. And this, too, without the protection which independent nations have against each other in the mutual dread of retaliation of war.

19. The argument of the appellants at the hearing did not embrace a review of authorities which it now appears by the opinion of the court are deemed decisive of the

question; nor did it subject the theory of a *unity of use* to a thorough scrutiny, showing the grave objections to it.

The excuse for the omission of a review of the prior decisions is this: The cases of railroad and telegraph companies are, it will be agreed, to say the least, very different from that of express companies. They are assimilated to it in the opinion of the court on the ground that the property of the latter constitutes a unit profit producing plant, an idea which, it will be admitted, has never before been entertained by this court. The extreme differences between the case of express companies and the class of companies above mentioned would alone have justified a hesitancy on the part of counsel in bringing into the discussion the decisions in the latter class of cases as being too remote. But, more than this, this court had in substance declared them inapplicable. It had said, in Pacific Express Co. vs. Seibert (142 U. S. 339-354): "On the other hand, express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted;" that express companies were "entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws and upon other and different principles," and that "in the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The opinion of the court disposes of Pacific Express Co. vs. Seibert by saying that Mr. Justice Lamar's reference was "to the legislation of the state of Missouri, and the scheme of taxation under consideration here was not involved in any manner." But the objection there made to that legislation (which imposed a tax on the gross receipts of the express company) was that the statute violated

the fourteenth amendment in denying to express companies the equal protection of the laws, because it did not impose a similiar tax upon other persons, such as railroad companies, engaged in similar occupations. The answer of this court to that contention was, in the "language of Mr. Justice Lamar, that express companies were *entirely dissimilar* as regards the purposes and policy of taxation from railroad companies," and that "in the *nature of things*, and irrespective of the *definitive legislation of Missouri*, they belonged to *different* classes;" and because they belonged to different classes, the court held that the statute of Missouri, which imposed a tax upon them, that was not laid on railroads, was not in contravention of the provision of the Federal Constitution, which vouchsafes the equal protection of the laws.

It is now, however, declared by the court that the prior decisions of the court in the railroad, telegraph and sleeping car company cases do decide, in principle at least, the very point raised in the present cases, and this opinion is reached without the benefit to the appellants in the present case of a close review of those decisions for the purpose of showing that such is not the fact.

As to the omission to scrutinize the foundation of the theory of a *unity of use* as a basis of taxation, the reason is the same. It had never been stated, in terms, by this court. Nor was it suggested by counsel for the Commonwealth, or by the Court at the hearing. In the Gloucester Ferry case it had been urged by the Attorney General of Pennsylvania under the plea of a "homogeneous unit" (114 U. S. 201) and repudiated by the court. The railroad, telegraph and sleeping car decisions had made no allusion to it. These were put on other grounds stated in the review hereto annexed. The notion is the invention of the Supreme Court of Ohio. How could counsel think it necessary to discuss such a theory when it had been so

plainly intimated by this court that express companies, at least, could not be dealt with in such a way?

Respectfully submitted,

JAMES C. CARTER,

LAWRENCE MAXWELL, JR.,

Counsel.

REVIEW OF SOME OF THE AUTHORITIES RELIED UPON IN THE OPINION IN THE OHIO CASES.

Pullman Palace Car Co. vs. Pennsylvania (141 U. S. 18).

In this case the taxes challenged were levied under statutes of Pennsylvania, imposing, in form, taxes on the capital stock of corporations incorporated by the laws of Pennsylvania or of any other state and doing business in Pennsylvania, to be computed on a certain percentage of dividends made and declared. It was *treated* as being not a tax on capital stock, but on property. The tax was made to depend partly upon the value of the capital stock, and partly on the amount of dividends, and the tax would, therefore, be dependent in part upon the value of the capital stock as ascertained in the manner provided by the act. So far as appears from the case the only questions to be determined were those stated by Mr. Justice Gray at the opening of his opinion, which was that of the court. "Upon this writ of error whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could only be taxed in the state of Illinois, in which it was incorporated and had its principal place of business." We understand by this that the plaintiff in error took two grounds: First, that the taxation of such railroad cars at all, when in actual use, was a burden upon interstate commerce, and therefore void. Second, that if such cars were subject to taxation at all they could be taxed only where the corporation had its domicile, which was in Illinois.

The point involved in our express cases is, whether in

assessing the value of the personal property of an express company, which has confessedly an ascertainable market value, such market value can be totally disregarded and superseded by reference to another criterion which has no relation whatever to value, as that term is commonly understood, and especially by reference to the value of a right to prosecute interstate commerce.

How these points can be supposed to have been determined by the discussion and determination of the questions above stated, as arising in the case of the Pullman Car Company against Pennsylvania, is not easy to see. Upon perusing the opinion in that case, it will be perceived that it begins by an emphatic statement and maintenance of the rule that property is not subject to taxation by a state unless it has an actual situs therein. It was manifest that the sleeping cars had an actual situs outside of the place of domicile of the company owning them, and therefore that they were justly taxable outside of that state. The puzzle was that they had this actual situs as much in one of several other states as another. Each might put in a claim that a situs was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping car property was fairly to be treated as having a situs in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that *no* method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different states, the decision in the sleeping car case would have justified the adoption of some equitable method of ascertaining to how many of them a situs in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never

asserted, in the remotest degree, that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce.

If the sleeping cars, the taxation of which was the subject of dispute in this case, had been entirely confined in their operation and use to the state of Pennsylvania, and had been proved to be of the value of $10,000, and had, by a reference to the capital stock of the Pullman Car Company and the proportion of its lines within the state to that outside of it, been assessed at the value of $200,000 each, and the question had arisen as to the validity of such an assessment, a decision sustaining the assessment would have been authority in this case. The appellants' counsel can not help thinking that if such had been the question, the taxation sustained in that case would have met a different fate.

There is indeed, in the opinion of the court, the following statement: "The tax on the capital of the corporation, on account of its property within the state, is in substance and effect, a tax on that property," but this statement can not be regarded as any part of the decision, because no issue was joined on it, nor was it subjected to any discussion whatever, as will be seen by the observation which immediately follows, namely: "This is not only admitted, but insisted on, by the plaintiff in error," that is to say, the opinion deals with the case of the plaintiff in error upon its own avowed assumptions.

It may be asked, however, if we admit the correctness of the proposition thus stated by the court. We do admit it fully in the sense in which it is declared in one of the two cases cited which affirm it. Nothing is more common than attempts by a state, where they are precluded by constitutional principles from taxing directly a particular item of property, to reach the object indirectly by imposing a tax upon some other thing which includes it or is dependent upon it. Wherever such an attempt is made it ought to be denounced

and defeated. The first case referred to by Mr. Justice Gray, Gloucester Ferry Co. vs. Pennsylvania (114 U. S. 196), was one of that character. The state of Pennsylvania wanted to tax a ferry boat belonging to a New Jersey corporation, which was employed on a ferry across the Delaware river, and which was, of course, from time to time, within the territory of Pennsylvania. It could not, it was admitted, do that directly. It sought to do it indirectly by attempting to impose a tax upon the capital stock of the New Jersey Company. This court promptly declared, as it ought to have done, that that was in substance and effect the same thing. What better authority could be found than this to support the contention of he appellants? The state of Ohio had, in every way which ingenuity could suggest, taxed everything which it had a right to tax against these express companies. It wanted to tax the capital stock. It knew that this could not be done directly. It sought to accomplish the same thing indirectly by imputing an utterly fictitious value to personal property owned by that company in the state and subject to taxation. What ought to be said in this case (a proposition laid down by Mr. Justice Gray in the case of the Pullman Car Company against Pennsylvania, abundantly sustained by the Gloucester Ferry Company vs. Pennsylvania, and by many other cases) is, that the state of Ohio, not having the right to tax the capital stock of these express companies directly, must not do it by the device which it has sought to employ.

It should hardly be necessary to say, however, that when a court stigmatizes an attempt by a state to tax specific property within it which it has no right to tax, by saying that an indirect effort to accomplish the same thing by an attempt to tax capital stock can not be permitted, it does not mean, by any means, that the taxing of specific property and the taxing of capital stock are so far identical that one may properly be resorted to wherever the other can be employed. Specific property belonging to a corporate body may have an

actual situs within a state, and therefore be the subject of taxation, but it by no means follows from this that the capital stock or some portion of it, of such corporation, has such actual situs.

The case of Maine vs. Grand Trunk Ry. Co. (142 U. S. 217) was, as the court declares in the beginning of its opinion, "*an excise tax* upon the defendant corporation for *the privilege of exercising its franchises* within the state of Maine. The subject matter of the tax was confessedly one within the taxing power of the state. There must necessarily, therefore, be some allowable mode for ascertaining the value of that privilege. The mode adopted was by a reference *to comparative gross receipts*. What error can be suggested in such a method, especially when, as in Maine, it was the one adopted as to domestic corporations of the same character? How can such a case, which was not that of a tax upon specific property, nor one in which the method was by a reference to the value of capital stock, nor one in which the amount of the tax was dependent upon the supposed value of the subject taxed, nor one in which, if it were so dependent, the subject taxed had a fixed value, be regarded as an authority upon the questions in these express company cases?

In the case of Pittsburg Railway Co. vs. Backus (154 U. S. 421), the tax assailed was one upon that part of the railroad property situated within the state of Indiana. The law under which the tax was imposed did not lay down any rule, as in these express company cases, for the *guidance* of the assessing board in determining value, but required it to assess it at its "actual cash value." It did, however, require statements which indicated that the board might and should look to the value of the whole road in determining the value of the part.

This mode of assessing property of a railroad company, un-

doubtedly within the state, was put in this case, as in a prior case cited in the opinion, upon its true ground *necessity*. Are these cases authority for another in which the whole basis of the decision is wanting?

The next case cited in the opinion of the court is that of the Cleveland Railway Company vs. Backus (154 U. S. 439). The special attention of the court is respectfully called to the opinion. It was a case of taxation of railroad property under the same law as in the case last above mentioned, but the validity of the method was more emphatically assailed in argument, and was considered by Mr. Justice Brewer with great candor and deliberation. He was evidently not insensible to the abuses possible in the case of the imposition by one state of taxes upon the property of citizens of another state; but he properly recognizes the fact that it was right and indeed necessary that such taxes should be imposed. He upheld this method of assessment upon the obvious ground that it was the *true and natural method* which the individuals would employ, and was indeed the only practicable method; and that either such method *must* be adopted or the property be suffered to go exempt of taxation. He insisted that in the case of *such* property "there is no pecuniary value outside of that which results from such use;" and that it was impossible to disintegrate the value of that portion of the road within Indiana" (p.445). He affirmed the rule that no state must put any burden in any way upon interstate commerce, but declared that "the taxation of property *according to the ordinary rule of property taxation*" did not violate that rule.

We respectfully invite the attention of the court to the whole of this opinion, and especially to so much of it as is on pages 443-447. Is it possible to think that if in that case it had appeared that there was "outside of the use to which the property was put" a distinct and clearly ascertainable pecuniary value, that the property could be separated from

the use to which it was put, and bear the same value which it possessed before it was put to that use, that such property was *ordinarily* taxed in a wholly different way, and that the whole field of invasion of these rules which forbid the taxation of interstate commerce, or of property outside of the jurisdiction would be thrown open if the ordinary method should be displaced, the decision would not have been the other way?

The last case cited by the court is that of the W. U. Tel. Co. vs. Taggart (163 U. S. 1). The decision was to the effect that the value of the easements, poles, wires, etc., of a *telegraph company* within a state were subject to the same rules of taxation as are applicable to the case of a railroad company. Nothing is perceived in this doctrine which has any direct bearing. It is relevant however in one respect, namely, that for the true defense of the principle of taxation as applied to the cases of railroads, it quotes very largely from the opinion of the court read by Mr. Justice Brewer, in the case of Cleveland, etc., Railway Company vs. Backus (154 U. S. 439) above referred to, and adopts the reasoning laid down in that opinion.

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Clerk

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 586.

LEVI C. WEIR, President of the Adams Express Company, Appellant,

vs.

L. C. NORMAN, Auditor of Public Accounts of Kentucky.

RESPONSE TO SUPPLEMENTAL BRIEF.

Wm. J. Hendrick,
Counsel for Appellee.

(16,365.)

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RESPONSE TO SUPPLEMENTAL BRIEF.

The supplemental brief filed in this case, No. 586, is a copy of the petition for rehearing filed by the same appellee in Nos. 337, 338, 339, 340, 398, 399, 400, 469, 470, and 471.

The principal burden of the petition for rehearing in the one case and the supplemental brief in this case is that "this doctrine of the effect upon taxation of a *unity of use* was not discussed in the argument of these cases and was not touched by appellant's counsel in the argument of these cases."

Counsel for appellant is thoroughly mistaken in the assumption that the "unity of use" was not discussed in this case upon the oral argument, for the reason that while in

the opinion rendered by this Court a name has been given for the first time to the idea expressed and constantly urged by counsel for the appellee, it is no less true that the "unity of use" as used by the learned Chief Justice in the opinion rendered in the Ohio and Indiana cases is the entire ground upon which the counsel for appellee in this case expected and hoped to win this case.

It is true that the words "unity of use" were not used by any counsel in the argument of either the Kentucky, Indiana, or Ohio cases, but it is equally true that this felicitous expression, while used for the first time by the Chief Justice in the delivery of the opinion in this case, was undoubtedly a better and more accurate expression of the idea expressed by the circuit court of appeals in the words "unit-producing plant;" so that, without any effort whatever to answer *in extenso* the argument of counsel presented in the supplemental brief, I think it is amply sufficient for the purposes of the appellee in this case to rely exclusively upon the lucid opinion of this Court in the case of Sanford *vs.* Poe and others, from the circuit court of appeals for the sixth circuit and from the circuit court for the southern district of Ohio, rendered February 1, 1897.

If the petition for rehearing and re-argument should be allowed in the Ohio and Indiana cases, of course it would be desirable for a re-argument in this case in connection with those cases; but there seems to be no good reason for a re-argument, in view of the fact that the learned counsel for the appellant in those cases has had the benefit of a re-argument *in fact* by the elaborate brief filed in support of his petition for rehearing and by the supplemental brief in this case.

An affirmance in this case is respectfully asked.

WM. J. HENDRICK,
Counsel for Appellee.